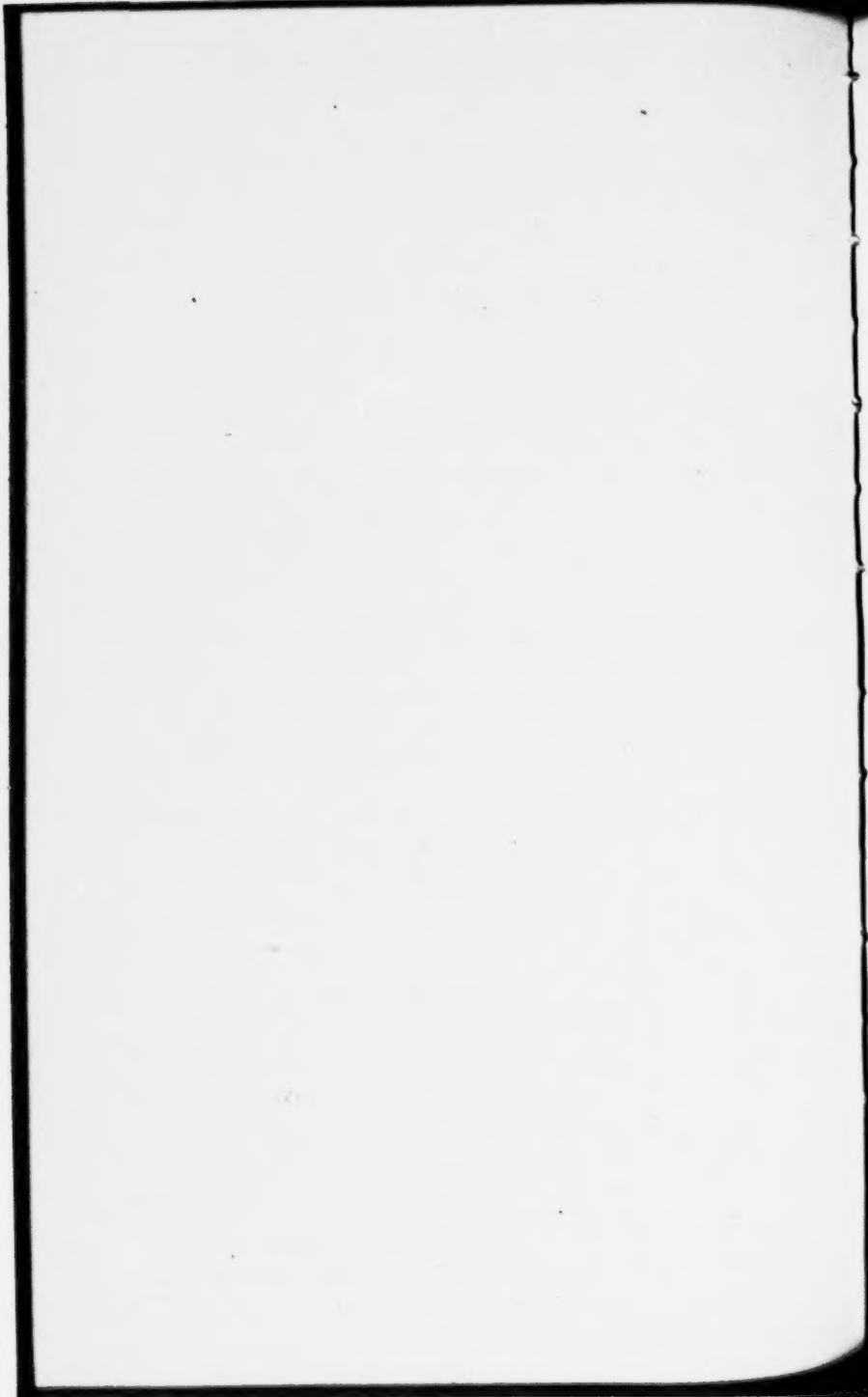


HERMAN BUDMAN,

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Ninth Circuit.

A. L. WINTER,
FIRM OCEANO,
257 South Spring Street, Los Angeles 12,
Attorneys for Petitioner.



SUBJECT INDEX.

| | PAGE |
|--|------|
| A. | |
| Summary statement of the matter involved..... | 1 |
| Preliminary statement | 1 |
| Statement of the case..... | 2 |
| Opinion of the court below..... | 8 |
| Jurisdiction | 8 |
| Questions presented | 9 |
| Specification of errors..... | 9 |
| B. | |
| Reasons relied on for allowance of the writ..... | 10 |
| I. | |
| Direct conflict between the decision of the Court of Appeals below and the Second Circuit Court of Appeals..... | 10 |
| II. | |
| The decision of the Court of Appeals erroneously construes the meaning of "religious training and belief"..... | 12 |
| 1. The court below rejected authoritative and contempo- raneous construction of the phrase..... | 12 |
| 2. The petitioner was opposed to all wars by reason of religious training and belief..... | 13 |
| 3. The Circuit Court's opinion analyzed..... | 15 |
| III. | |
| The trial judge did not review the evidence submitted to the Selective Service agencies. Hence the cause should be re- manded for a new trial..... | 30 |
| IV. | |
| The sentence imposed by the District Court was excessive and improper; the judgment should be reversed and the cause remanded for resentence | 30 |

TABLE OF AUTHORITIES CITED.

| CASES. | PAGE |
|--|---------------|
| Estep v. United States, 326 U. S., 90 L. Ed. 405..... | 2, 31 |
| Husty v. United States, 282 U. S. 694, 51 S. Ct. 240, 75 L. Ed. 629 | 31 |
| Hysler v. Florida, 315 U. S. 411, 62 S. Ct. 688, 86 L. Ed. 932 | 32 |
| Kauten v. United States, 133 F. (2d) 703..... | 2, 10, 11, 14 |
| Mathews v. West Virginia ex rel. Hamilton, 320 U. S. 707..... | 31 |
| McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 | 31 |
| Minnesota v. National Tea Co., 309 U. S. 551, 60 S. Ct. 676, 84 L. Ed. 920..... | 32 |
| Newcomb v. United States, 143 F. (2d) 586..... | 31 |
| New York ex rel. Whitman v. Wilson, 318 U. S. 688, 63 S. Ct. 840, 87 L. Ed. 1083..... | 31 |
| Patterson v. Alabama, 294 U. S. 600, 55 S. Ct. 575, 79 L. Ed. 1082 | 31 |
| Smith v. United States, 326 U. S., 90 L. Ed. 405..... | 2, 31 |
| State Tax Commission v. Van Cott, 306 U. S. 511, 59 S. Ct. 605, 83 L. Ed. 950 | 32 |
| United States v. Badt, 141 F. (2d) 845..... | 2, 12 |
| United States v. Badt, 152 F. (2d) 627; certiorari dismissed on motion of Solicitor General, 66 S. Ct. 979, 90 L. Ed. 912.. | 2 |
| United States v. Carolene Products, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234, footnote..... | 30 |
| United States v. Downer, 135 F. (2d) 521..... | 2 |
| United States v. Phillips, 135 F. (2d) 521..... | 11 |
| Villa v. Van Schaick, 299 U. S. 152, 57 S. Ct. 128, 81 L. Ed. 91 | 31, 32 |

| | |
|--|----|
| Walling v. Reuter, Inc., 321 U. S. 671, 64 S. Ct. 826, 88 L. Ed. 1001 | 31 |
| Yosui v. United States, 320 U. S. 115, 63 S. Ct. 1392, 87 L. Ed. 1793 | 31 |

STATUTES.

| | |
|--|--------|
| Judicial Code, Sec. 240a (24 U. S. Code, Sec. 347(a))..... | 8 |
| Selective Training and Service Act, Sec. 5g..... | 1 |
| 50 United States Code, Annotated, App., Sec. 311..... | 2 |
| United States Constitution, First Amendment..... | 16, 24 |

TEXTBOOKS.

| | |
|--|----|
| Barnes, History and Social Intelligence, p. 347..... | 26 |
| 2 Hastings' Encyclopedia of Religion and Ethics, p. 179 | 20 |
| 2 Hastings' Encyclopedia of Religion and Ethics, pp. 183, 184, 185 | 19 |
| International Journal of Ethics, July, 1900, p. 425..... | 21 |
| Müller, Natural Religion, p. 228..... | 19 |
| Nock, Jefferson, p. 304..... | 22 |
| Remsburg, Six Historic Americans, p. 66..... | 22 |
| Remsburg, Six Historic Americans, pp. 120-121..... | 25 |
| The Conscientious Objector Under the Selective Training and Service Act of 1940, published by National Service Board for Religious Objectors, Washington, D. C., p. 2..... | 12 |

INDEX TO APPENDICES.

| | PAGE |
|---|------|
| Appendix A. Letters contained in the Draft Board file in behalf of appellant's contention that he was a conscientious objector | 1 |
| Appendix B. Letter from Professor Walter G. Muelder, testifying to appellant's religious training and belief..... | 5 |
| Appendix C. What is religious training and belief?..... | 8 |
| Appendix D. Comment on opinion of United States Circuit Court of Appeals for the Ninth Circuit on the case of Herman Berman v. United States, by Walter George Muelder, Dean and Professor of Social Ethics, Boston University School of Theology, Boston, Massachusetts..... | 26 |

IN THE
Supreme Court of the United States

October Term, 1946.

No.....

HERMAN BERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Ninth Circuit.

A.

**SUMMARY STATEMENT OF THE MATTER
INVOLVED.**

Preliminary Statement.

This petition brings to this Court for definitive judicial construction the meaning of the phrase "religious training and belief" in Section 5g of the Selective Training and Service Act.

That phrase has never heretofore been considered by this Court. Its meaning is of grave consequence to the many thousands of conscientious objectors directly affected by the draft law, as it is of deep concern to all religious-minded persons in the United States, on the one hand; on the other hand, an interpretation from this Court of the meaning of that phrase in the draft law should be

of value to those charged with the responsibility of administering the Selective Service System.

The Court of Appeals below, Judge William Denman dissenting, refused to follow the liberal views of the Second Circuit Court of Appeals, frankly stating that it took "divergent views from those expressed in these cases." [R.39.]¹ Judge Denman stated that the decision of the majority "on this important question of law is in conflict with the decision of the Second Circuit in *United States v. Phillips*, 135 Fed. 2d 521. I am in accord with all that the Second Circuit there says and holds." [R. 56.]

Statement of the Case.

The petitioner registered under the Selective Training and Service Act of 1940 and requested classification as a conscientious objector. He was classified by his local board and the appeal board as 1-A, available for military duty, and was ordered to an induction center, there to be inducted into the armed forces. He went to the center, but refused to be inducted. He was thereafter charged under the Act, 50 U. S. C. A. App., Sec. 311, with the offense of refusing to obey a board order, and after trial before a district judge he was convicted. He was tried on November 24, 1944 [R. 15], before the decision of this Court in *Smith v. United States*, 326 U. S., 90 L. Ed. 405 (1945), and *Estep v. United States*, 326 U. S., 90 L. Ed. 405 (1945).

¹The decisions of the Second Circuit Court referred to are *United States v. Kauten*, 133 F. (2d) 703 (1943); *United States v. Downer*, 135 F. (2d) 521 (1943), and *United States v. Badt*, 141 F. (2d) 845 (1944). Cf. also *United States v. Badt*, 152 F. (2d) 627 (1945), certiorari dismissed on motion of Solicitor General, 66 S. Ct. 979, 90 L. Ed. 912.

The district judge below, in effect, refused to permit the petitioner to prove his defense that the Selective Service agencies had acted arbitrarily, and had erroneously construed the meaning of the phrase "religious training and belief." Thus, the trial judge, while permitting the petitioner's draft board file to be introduced in evidence [R. 22], announced that he would not review it, stating [R. 20]:

"I am not reviewing it . . . now you are going right into the question of reviewing matters that were before the Board for decision; and I am not going to do it." [R. 20.]²

Found guilty, the petitioner was sentenced to imprisonment for three and one-half years in a penitentiary. [R. 7.]

The petitioner's evidence is fairly set forth by the Circuit Court below, in part, thus [R. 39]:

"The petitioner was active in various social movements and had been active in various peace movements both before and after Pearl Harbor; he had become interested in the peace movement while in junior high school, and had been executive secretary in Los Angeles of the Youth Committee Against War, a national organization composed of students, religious young people and young workers who were opposed to war as a method; he was opposed to all war, and had made speeches on the question of war; his atti-

²When the petitioner's counsel sought to make an explanation of his position, the trial judge cut him off with the comment, "I don't want another speech." [R. 21.] At another point when petitioner was, through examination of a witness, seeking to ascertain whether the board had any evidence before it other than the evidence which was in the board's file, the judge observed, "I know, but you just keep scratching like a hen with one chicken, just keep scratching all the time." [R. 25.]

tude upon the question of war was based on his conscience and fundamental belief in, and devotion to, the brotherhood of all men; at all times he has been willing to and desired to go to a conscientious objector's camp and do work of national importance under civilian direction; he had even been willing to work with the American Field Service and undertake hazardous and life-risking ventures in connection therewith. He would not do non-combatant work within the jurisdiction of the army because his conscience would not permit him to do so; he could not submit to military jurisdiction which was constructed mainly for the destruction of human life when he was 'devoted to the construction of human welfare and human betterment.' He was a socialist and his belief in socialism was based on a desire to better the life of human beings in general.

"The appeal board had before it, also, the report of the Hearing Officer of the Department of Justice, which stated in part:

" 'A perusal of the numerous pamphlets and circulars of a number of which Registrant says he was the author indicates that the vigorous and crusading opposition in which Registrant participated so fervently was directed against this war.' And further,

" 'I believe that Registrant is sincere in his effort to promote the Socialist Party, in his belief that war is futile, and in his diagnosis of the war as a war for the benefit of Capitalists. He has plenty of courage. He is, and long before Pearl Harbor was, willing to espouse his opposition to war whether practical or impractical. If he stood alone, he would oppose this war and would fight our participation in it as zealously—even with equal futility—as King Canute, who tried to turn back the tide.'

"On Form 47, the conscientious objector form, petitioner stated:

" 'Therefore, for the sake of humanity and out of deep loyalty to my fellow citizens I am opposed to war and refuse to participate in any activity connected with the war effort. However, I seek to continue working in the fields of constructive effort, alleviating distress among the under-privileged members of society, assist in breaking down the barriers of race, color, and creed, and work towards a society based on social ownership and co-operative and genuinely democratic control of the means of production and distribution for the benefit of all mankind.'

"He sent a statement to his local draft board (January 25, 1943) containing the following:

" 'War as a method is totally wrong! Its futility, its hopelessness, its inexpediency, its cost in human lives are appalling! The war method cannot be, never has been and never will be a method of social progress—for it works through destruction to destruction. If a small fraction of the effort spent on one day of war were utilized toward a peaceful and sane solution of the world's problems, how much further on the road to a better world we would be—a world based on equality, peace, and plenty. I refuse to participate in this futility. I shall not assist in this wholesale massacre. Instead, I have chosen to join my ever-increasing number of comrades in refusing to co-operate in any way with this war effort. As alternative service, only under civilian direction and control, I will work in a socially constructive effort, such as

the co-operative movement, the peace movement, in reconstruction work, etc.' ”

The Appeal Board had before it the entire draft board file containing various letters from clergymen and others attesting to the fact that the petitioner's beliefs were based upon a deep and sincere desire to be of benefit to humanity and an honest conviction that he could not place himself in a position whereby he would harm any other person.

Some of these stated that he was a sincere, conscientious objector “because of his devoted work for peace” [Mrs. Helen Beardsley,³ Appendix “A”⁴]; that he held his convictions with “religious fervour” [Norman Thomas, Appendix “A” 2]; that he had “been a consistent conscientious objector . . . and that his conscience is such that he declines to take up arms to kill another human being” [Ernest Caldecott, Minister, First Unitarian Church, Ap-

³It is interesting to note that the majority of the Court below gratuitously dubbed Mrs. Beardsley as a “well-known socialist” [R. 42]; there is nothing in the record to support the Court's assertion. Of Norman Thomas, the Court thought that he was “perhaps the leading American socialist” [R. 42]; Judge Denman considered Norman Thomas “a Presbyterian and long a clergyman of churches of that faith” [R. 53].

⁴Letters contained in the draft board file of the petitioner [Deft. Ex. A], for the convenience of the Circuit Court below were printed as Appendices “A” and “B,” and attached to the petitioner's Opening Brief in the Circuit Court. In its opinion, the Circuit Court refers to these documents as Appendices “A” and “B,” respectively [R. 42]; accordingly, these documents are reprinted in Appendices “A” and “B” to this Petition, for the convenience of this Court.

pendix "A" 2]; that the petitioner's convictions are "fundamentally based on religious beliefs, even though he is not attached to our particular church" [Harold Slocum, Associate Minister, Mt. Hollywood Congregational Church, Appendix "A" 3]; that "he apparently wants to dedicate to a way of living that will help mankind and promote the highest ideals of this country. Herman Berman is not a member of any church but he is, I believe, willing to give his life in service to man." [Allan A. Hunter, Minister, Mt. Hollywood Congregational Church, Appendix "A" 4.]

According to a letter from Walter G. Muelder, Professor of Christian Theology and Christian Ethics at the School of Religion, University of Southern California, in the petitioner's Selective Service file, the petitioner "has a deep sense of reverence for life and for the sacredness of personality. . . . His reaction is not simply one of political or economic displeasure, but a total spiritual protest against the war system and all its causes along with a whole-hearted commitment to a society which shall be thoroughly democratic." [Appendix "B" 5.]

Indeed, Hearing Officer C. H. Hartke in his report stated that:

"3. Registrant states that he is a member of no church and is not a student of the Bible; that he has grown up in a Jewish home of a Jewish family, and of religious parents. When asked of what his religion consisted he stated in substance that his principal religious belief was that of doing all the good

he can for people in need, and to do everything he could to help his fellow-man—'to do by others as he would be done by.' In other words, 'The Golden Rule'; to enter into all cooperative movements and efforts to help his fellow man to develop a democratic and socialistic form of life; that he had for the last few years and expected in the future to devote himself to his work, selling and distributing pamphlets and peace literature as mentioned above."

At a time when there was an urgent need for hospital attendants, the petitioner voluntarily secured employment at the Neuro-psychiatric Ward of the Veterans' Hospital in West Los Angeles, attending wounded war veterans.⁵

Opinion of the Court Below.

The opinion of the District Court below is as yet unreported. It appears in the Record at page 36; the dissenting opinion of Judge Denman is at page 50.

Jurisdiction.

Jurisdiction of this Court is invoked under Judicial Code, Section 240(a); 24 U. S. Code, Section 347(a).

The judgment of the Circuit Court of Appeals below was entered on June 25, 1946. The Court below denied a Petition for Rehearing, filed within time allowed therefor, on August 27, 1946. [R. 69.]

⁵Appendix to Petition for Rehearing in Court below [R. 67].

Questions Presented.

1. Did the Circuit Court below erroneously construe the meaning of the phrase "religious training and belief" in the Selective Training and Service Act, when it ruled that such belief is posited upon a "concept of deity" [R. 46]; that such belief includes as an indispensable element belief in "responsibility to an authority higher and beyond any worldly one" [R. 44], and "faith in a supreme power above and beyond the law of all creation" [R. 45], as well as "belief in the super-natural"? [R. 48.]

2. Should a new trial be granted, or shall the cause be remanded because:

- a. The trial judge did not review the evidence before the Selective Service authorities, or
- b. The sentence was improper?

Specification of Errors.

The petitioner relies upon the specification of errors below [R. 28]; and on the error assigned in his Petition for Rehearing, page 1. [R. 61.] (The nature of the specification of errors is suggested by our statement of the "Questions Presented.")

B.

REASONS RELIED ON FOR ALLOWANCE OF
THE WRIT.

I.

Direct Conflict Between the Decision of the Court of
Appeals Below and the Second Circuit Court of
Appeals.

The Second Circuit Court of Appeals took the view, rejected by the Court below,⁶ that "a response of the individual to an inward mentor . . . is for many persons at the present time the equivalent of what has always been thought a religious impulse."

In *Kauten v. United States*, 133 F. (2d) 703, 708 (1943), the Second Circuit, speaking through Judge Augustus Hand, said:

"It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-man and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited to it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets. A religious

⁶The Second Circuit is the only Court of Appeals, other than the Ninth Circuit below, that has passed upon the question.

obligation forbade Socrates, even in order to escape condemnation, to entreat his judges to acquit him, because he believed that it was their sworn duty to decide questions without favor to anyone and only according to law. Such an obligation impelled Martin Luther to nail his theses on the door of the church at Willenberg and, when he was summoned before Emperor Charles and the Diet at Worms, steadfastly to hold his ground and to utter the often quoted words: 'I neither can nor will recant anything, since it is neither right nor safe to act against conscience. Here I stand. I cannot do other. God help me. Amen.' Recognition of this obligation moved the Greek poet Menander to write almost twenty-four hundred years ago: 'Conscience is a God to all mortals'; impelled Socrates to obey the voice of his 'Daimon' and led Wordsworth to characterize 'Duty' as the 'Stern Daughter of the Voice of God.'

"There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."⁷

⁷Judge Denman, below, accepted the Second Circuit Court's views quoting the following [R. 56]: "The decision of this court of appeals on this important question of law is in conflict with the decision of the Second Circuit in *United States v. Phillips*, 135 F. (2d) 521. I am in accord with all that the Second Circuit there says and holds," and that Judge Augustus Hand's opinion in the *Kauten* case "excellently stated" the "recognition of religion" as not requiring a God. [R. 55.]

And later in *United States v. Badt*, 141 F. (2d) 845, 847 (1944), that Court of Appeals rejected the views of a Selective Service hearing officer who sought to draw a distinction (as drawn by the Court of Appeals below over the protest of Judge Denman) between "religion" and "philosophical humanitarianism."

II.

The Decision of the Court of Appeals Erroneously Construes the Meaning of "Religious Training and Belief."

1. THE COURT BELOW REJECTED AUTHORITATIVE AND CONTEMPORANEOUS CONSTRUCTION OF THE PHRASE.

Thus the Selective Service System itself defines⁸ religious training and belief:

"Religious training may be considered as having been received in the home, in the church, in other organizations whose influence is religious though not professedly such, in the school, or in the individual's own personal religious experience and conduct of life. Any and all influences which have contributed to the consistent endeavor to live the good life may be classed as 'religious training.' Belief signifies sincere conviction. Religious belief signifies sincere conviction as to the supreme worth of that to which one gives his supreme allegiance.

⁸In a memorandum submitted in 1940 to the State Directors, approved both by the then Director Clarence H. Dykstra and General Lewis B. Hershey, the present director. Portions of the memorandum are reprinted in "The Conscientious Objector Under the Selective Training and Service Act of 1940," published by the National Service Board for Religious Objectors, Washington, D. C., p. 2.

“‘ . . . conscientiously . . . opposed to participation in war in any form’ may be interpreted as meaning that a person may have become a conscientious objector to war, either by specific teaching, as for instance, the Quaker tenet of non-participation in war, or by specific application of fundamental doctrines, as for instance, the Christian doctrines of reverence for life, ‘non-retaliation,’ ‘brotherly love,’ expressed in phrases such as ‘Love your enemies’; ‘Render to no man evil for evil’; etc.”

2. THE PETITIONER WAS OPPOSED TO ALL WARS BY REASON OF RELIGIOUS TRAINING AND BELIEF.

Certainly, the Record here abounds with unchallenged evidence that the petitioner believed in and practiced the doctrines of “reverence for life” and “brotherly love” within the definition of the Selective Service System itself.⁹

Thus, after reviewing all the evidence before the Selective Service agencies, the Court below conceded of the petitioner that “his attitude upon war was based on his conscience and fundamental belief in, and devotion to, the

⁹Cf. Hearing Officer C. H. Hartke’s report of the petitioner [Document No. 2, Deft’s Ex. A]: “When asked of what his religion consisted he stated in substance that his principal religious belief was that of doing all the good he can for people in need, and to do everything he could to help his fellow-man—‘to do by (to) others as he would be done by.’ In other words, ‘The Golden Rule’; to enter into all cooperative movements and efforts to help his fellow man to develop a democratic and socialistic form of life; that he had for the last few years and expected in the future to devote himself to this work, selling and distributing pamphlets and peace literature as mentioned above.”

Certainly, the “Golden Rule” is a religious precept. Believing in it, constitutes “religious belief”; practicing it, constitutes the best “religious training.”

brotherhood of all men." [R. 40.] Also, that petitioner's belief in socialism was "based on a desire to better the life of human beings, in general." [R. 40.]

Accordingly, the effect of the petitioner's belief is that he believed in the doctrines of "reverence for life" and of "brotherly love." Being opposed to *all* war because of that belief, he complied with the definition of "religious belief" of the Selective Service System. (*Cf. supra*, p. 13.)

Moreover, the petitioner consistently practiced his faith. He thus made, as the Selective Service System in the test puts it, a "consistent endeavor to live the good life" within the definition of "religious training" of the Selective Service System. (*Cf. supra* at p. 13.)

Moreover, the mere fact that the petitioner was a Socialist does not prevent him from being deeply and essentially religious; for "his belief in Socialism was based on a desire to better the life of human beings in general."

It was "for the sake of humanity and out of deep loyalty to" his fellow citizens that he was opposed to all war. So that the petitioner, in effect, made a "total spiritual protest against the war system and all its causes." Indeed, the unchallenged finding by the hearing officer that "He has plenty of courage. He is, and long before Pearl Harbor was, willing to espouse his opposition to war whether practical or unpractical. If he stood alone, he would oppose this war and would fight our participation in it as zealously—even with equal futility—as King Canute, who tried to turn back the tide" demonstrates that the petitioner was religious within the test adopted by the Second Circuit Court of Appeals in the *Kauten* case, that the essence of religious belief is that it finds "expression

in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets."

In short, the petitioner listened to and followed the dictates of his "inner mentor" which, according to Judge Hand, is the equivalent of a "religious impulse."

3. THE CIRCUIT COURT'S OPINION ANALYZED.

The Circuit Court's affirmance of Berman's conviction is founded on the proposition that "philosophy and morals and social policy without the concept of deity cannot be said to be religion." [R. 46.]¹⁰ This proposition amounts to the categorical assertion that religion requires belief in God. From this premise the Court moves to the conclusion that Berman is not entitled to classification in IV-E for the reason that he submitted no evidence to show that the concept of "God" is involved in his conscientious objection to war.

It is a clear inference from the reasoning of the Court that if Berman had by some means related his moral convictions to the idea of "God," his classification in IV-E should have been allowed. Belief in God, according to the Circuit Court, is the test of authentic religion; and therefore the test of "religious training and belief."

¹⁰As properly noted by Judge Denman, the construction given by the majority of the Court below ignores that: "Many of the great religious faiths with hundreds of millions of followers have no god." [R. 54.]

The Court bases its claim that belief in God is essential to religion on the dictionary type of definition,¹¹ but nowhere discusses the suitability of lending the force of law to limits thereby established. There is no consideration of the fact that dictionaries are compelled by space limitations and by the influence of tradition to confine definitions relating to philosophical and theological subjects to brief accounts of past and present usage, with no pretense at offering final judgments concerning questions that have been debated by the greatest minds of the past, and are still subject to much controversy in the present day. It is one thing to employ a dictionary to obtain approximations of the characteristics of religion as currently conceived, but quite another thing to require by law that a man's religion be conceived and expressed in such terms. Religious freedom means precisely the right of each man to conceive his religious beliefs and to worship in his own way. A decision which rules to establish orthodoxy in religious belief is in clear violation of the First Amendment to the Constitution. It is a "religious test."

It may be added that an important consideration for the Congress in formulating the provisions of Section 5g of the Selective Service Act was to make it possible for administrators to assure themselves that men attempting to qualify as conscientious objectors had not adopted this

¹¹Judge Denman points out that the opinion of the majority even ignores many dictionary definitions which "recognize that religion need have no god." [R. 55.]

Without attempting in the text of this Petition to give this Court a comprehensive definition of what constitutes religion, we attach hereto as Appendix "C" the text of a pamphlet published by the War Resisters League entitled "What Is Religious Training and Belief."

position as a temporary expedient in order to evade military service. The requirement of scruples against war "by reason of religious training and belief" was manifestly intended to assist in the just administration of the Act, giving opportunity for distinction between the sincere objectors to war and those who were lacking in deep scruples. "By reason of religious training and belief" implies a profound conviction, based on a way of life that has been consciously adopted. There is no reason to assume that the Congress intended this phrase to be rigidly interpreted as a religious test respecting the doctrinal beliefs of claimants to the IV-E classification. Congress has not the right to establish a legal criterion of what are religious beliefs and what are not. Congress may and does have the right to test the veracity, the sincerity and the general character of applicants for office and of those who seek to qualify as conscientious objectors under the law. Congress, as the Circuit Court points out [R. 44], makes many laws inclusive of morals, but it may not define religion in the formal terms of belief.

The fact is that the Court has condemned Berman as irreligious because his sort of religion does not correspond to dictionary definitions. His religion is unorthodox. But how many of the citizens of the United States today would be willing to accept without qualification the common dictionary definitions as correctly describing their religion? What would be the effect of attempting to establish with the force of law, in some other relation, a dictionary definition of religion, imposing consequent obligations or penalties on all unbelievers? We submit that this Court cannot contemplate the affirmation of the decision of the courts below without accepting in principle the validity of such legislation.

If Berman had been able consciously to formulate his religious convictions in some other manner, more conformable to an established creed, his recognition as a conscientious objector would doubtless have been assured. But Berman was compelled by an internal monitor to state his beliefs as he felt them, without adopting a familiar usage or theological form of expression. And, according to the decision of the Circuit Court, Berman must now suffer the punishment accorded to non-conformists as established by dictionary definition.

The Circuit Court, had it been in session at the time of the Reformation, would presumably have denied any genuine religious inspiration for the beliefs of Martin Luther, since Luther failed to define his religion in accordance with the prescribed meanings of the orthodoxy of his time. Surely many "authoritative" sources could have been adduced in evidence of his irreligious views!

If Berman's attitude cannot be called religious, and if his methods of developing his convictions are to be denied a religious quality, then a Federal Court of Appeal has assumed the right prerogatives of individual conscience itself, claiming the right to legislate concerning the requirements of Berman's personal religion and to prescribe the doctrinal beliefs he must maintain in order to avoid criminal prosecution.

Turning to the specific statements of the Circuit Court, theological scholarship gives little support to the claim that belief in God is necessary to religion. Only a casual reference to the literature of religious thought demonstrates the existence of great religious and system of religious philosophy which lack the concept of deity. Actually, many theological and scriptural treatises contain studied rejection of the idea of a Supreme Being.

Yet a majority of the Judges of the Circuit Court require of Berman an expression of faith comparable to the religious professions with which they happen to be familiar, being unwilling to acknowledge the possibility of a religious inspiration which is not overtly connected with the conventional idea of God. ●

This decision of the Court recalls the statement of the eminent scholar, Max Müller, that

“ . . . if an historical study of religion had taught us . . . one lesson only, that those who do not believe in our God are not therefore to be called Atheists, it would have done some real good, and extinguished the fires of many *auto da fé*.” (*Natural Religion*, p. 228.)

Hastings' *Encyclopedia of Religion and Ethics* quotes formal proofs of the non-existence of God from the literature of Buddhism. (*Op. Cit.*, Vol. II, 184.) The religious philosophy of Buddhism is stated to be “radically averse to the idea of a Supreme Being—of a God, in the Western sense of the word.” (*Ibid.*, 183.) The Sankhya School of the Hindu religion is characterized by a positive denial of the existence of God. Hastings offers extensive quotation of this Hindu argument against the existence of God, because it “is so important and so characteristic of Indian thought.” (*Ibid.*, 185.)

Thus two great world religions, numbering hundreds of millions among their believers, include explicit denials of the existence of God in important theological works. It can hardly be argued, therefore, that belief in God is essential to religion, or to a background of “religious training and belief.”

In the West, as Max Müller and others have frequently pointed out, deviation from conventional religious attitudes has often been made the occasion for charges of heresy and for persecution. The early Christians, despite their extraordinary piety and high personal morality, "were called atheists because they did not believe as the Greeks believed nor as the Jews believed." And, we may add, they were often punished by the Romans for refusing military service.

"Spinoza was called an atheist, because his concept of God was wider than that of Jehovah; and the Reformers were called atheists, because they would not deify the mother of Christ or worship the Saints." (Max Müller, *loc. cit.*)

An article in Hastings' *Encyclopedia* begins its discussion of the social doctrine of Auguste Comte, the founder of modern sociology, with these words:

"Comte's religious conception appears to be atheistic, insofar as it rejects the view that nature and humanity are the products of a self-existent and self-conscious Eternal Cause." (*Op. cit.*, II, 179.)

It is to be noted that the writer of this article, free from the pressures of controversy, and unaffected by any need for special pleading, speaks as a matter of course of "Comte's *religious* conception." (Our emphasis.) A passage from an essay on the religious ideas of the Positivists—as Comte's followers were known—written by Dr. Stanton Coit, the founder of the "Ethical Culture" societies of England, treats of the God-idea:

"So far as I am aware, the Positivists have never declared that Humanity is God. But they have maintained that all the homage and obedience which has

been rendered to God should now be transferred to Humanity. They have worshipped Humanity, they have prayed to it, they have found strength and consolation in communion with it. Surely, then, it has become their God." (*International Journal of Ethics*, July, 1900, p. 425.)

Berman, while no more than the Positivists declaring that Humanity is his "God," recorded on Selective Service Form 47 that he was "conscientiously opposed by reason of religious training and belief to participation in war in any form," and gave as his reason "the sake of *humanity*" and "deep loyalty to my fellow citizens." (Our emphasis.)

Surely, the determination of Berman's guilt or innocence should not turn on the presence or absence of a word in his profession of faith—the word "God"!

Even the Circuit Court, in affirming Berman's conviction, is at pains to reject "the literal word meanings of creeds" and admits growth in religious thought and understanding during the past 150 years. [R. 45.] This view of the Court, unfortunately nullified by its judgment of Berman, is in full accord with many contemporary theological conceptions and with the modern sociological approach to religion. Most Unitarians, Universalists, and many eminent preachers and teachers of the present day would define religion without any reference to a presumed entity to be labelled "God." Many of the most conscientious members of our society, before and since the time of Benjamin Franklin, have stood within the ranks of those whose religion required no "God" as an essential part of their faith. Thomas Jefferson, for example, writing counsel to his nephew at school, said:

"Fix Reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with

boldness even the existence of a God; because, if there be one, he must more approve the homage of reason than of blindfolded fear. . . . Do not be frightened from this inquiry from any fear of its consequences. If it end in a belief that there is no God, you will find incitements to virtue in the comfort and pleasantness you feel in its exercise and in the love of others which it will procure for you." (J. E. Remsburg, *Six Historic Americans*, p. 66.)

Anticipating the modern spirit, Jefferson mused in 1776:

"Why have Christians been distinguished above all people who have ever lived, for persecutions? Is it because it is the genius of their religion? No, its genius is the reverse. It is the refusing *toleration* to those of a different opinion. . . ." (A. J. Nock, *Jefferson*, p. 304.)

It is this toleration, for which Jefferson longed and labored, and which is established, in spirit, in the Constitution of the United States, which we find embodied in the modern definitions of religion. The formulations of a number of nineteenth and twentieth century authorities may be cited:

1. Höffding: Religion is belief in the conservation of value.
2. Marshall: The restraint of individualistic impulses to universal human impulses.
3. Kropotkin: A passionate desire for working out a better form of society.
4. E. S. Ames: The consciousness of highest social values.
5. Elwood: Participation in ideal values of the social life.

6. E. A. Ross: The conviction of an ideal bond between the members of society.

7. Matthew Arnold: Religion is morality touched with emotion.

8. G. B. Foster: The conviction that the cosmos is ideal-achieving.

9. G. W. Knox: Man's highest response to what he considers highest.

10. G. A. Coe: Living the good life.

11. J. R. Seely: Any habitual and permanent admiration.

12. Bonsanquet: Loyalty and devotion toward values which are beyond the immediate self.

To seek to define "religious training and belief" in the narrow terms of traditional religion is to go contrary to much of the best thought of the past three centuries. To be a conscientious objector *on religious grounds* surely cannot mean that one must accept a naive anthropomorphism in religion based upon a two-story universe theory. The Circuit Court [R. 46] cites Mr. Justice Hughes' dissent in the *Mackintosh* case—"The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation"—as though intending to use the term God to substantiate the idea of an *entity* existing outside the self. This is to fall into dualistic traditionalism and anthropomorphism which elsewhere [R. 45-46] the Court indicates it intends to avoid. One distinct advantage (to students of religion and thoughtful humans generally) which the term "God" has had is that it may stand for the inscrutable mystery of

life, birth, nature generally, or for "the moral law within" (of Immanuel Kant).

To use the word "God" in any instance *as though it settled an issue* is to indicate that one should not have used the word at all.

It would seem to be impossible for one to be truly devoted (*i. e.*, without self-interest) to man's general welfare, and remain truly conscientious and selfless in his devotion, without drawing upon all those resources (whatever their nature) which constitute what the religionist usually refers to as God, the Absolute, Nature, the Logos, the Tao, etc. Whether one chooses to use any of these terms in describing the source of his own drive or dynamic is quite beside the point—just as water satisfies thirst whether one knows its molecular structure or not. To insist, then, that one's philosophy of life is not "religious" unless it contains explicitly the "concept of deity" is to be guilty of theological traditionalism and outright dogmatism.

Citing the First Amendment to the Constitution, the Circuit Court asserts that "it would be quite ridiculous to argue that the use of the word 'religion' could have been understood by the authors of this part of our national charter . . . to be inclusive of morals or devotion to human welfare or of the policy of government." [R. 44.] We submit that it is even more "ridiculous" to imply that such concerns are beyond the pale of religion and cannot be animated by a religious impulse. It seems clear that the intent of the First Amendment was to render it forever impossible for the Congress of the United States to enact a law which would attempt to define the "true" religion, thereby working hardship on or discrimination

against those who have the misfortune to dissent or believe otherwise.

In effect, the decision of the Circuit Court assigns a particular view of religion to the authors of the Constitution and proceeds to force all subsequent religious experience into the Procrustean limitations of that view. But it is indeed questionable that many of the signers of the Declaration of Independence and makers of the Constitution would themselves have accepted the limitation which is now proposed to have the force of law. As a matter of fact, the authors of the Constitution anticipated and guarded against precisely the sort of limitations on religious belief that the Circuit Court wishes to apply. The proceedings of the Constitutional Convention, as published by Thompson, the secretary, show:

“ . . . that the question was gravely debated whether God should be in the Constitution or not, and after a solemn debate he was deliberately voted out of it. . . . There is not only in the theory of our government no recognition of God's laws and sovereignty, but its practical operation, its administration, has been conformable to its theory. Those who have been called upon to administer the government have not been men making any public profession of Christianity. Washington was a man of valor and wisdom. He was esteemed by the whole world as a great and good man, but he was not a professing Christian.” (J. E. Remsburg, *Six Historic Americans*, pp. 120-21.)

More than a few of the Founding Fathers would have failed to qualify as “religious” if the measure of their piety had been taken in terms of the prevailing orthodoxy of their day. Actually, orthodox spokesmen of that period

found many occasions to condemn as atheists the majority of distinguished Americans in the generation of the Fathers. The Reverend Dr. Wilson, in a sermon published in the *Albany Daily Advertiser* for 1831, pointed in dismay to the fact that most of the founders of our country were "infidels," and that *of the first seven presidents not one of them had professed his belief in Christianity*. (Harry Elmer Barnes, *History and Social Intelligence*, p. 347.)

The historian, Dr. Barnes, remarks:

"The late Mr. [Theodore] Roosevelt, in one of his more facetious and gracious moments, referred to Thomas Paine, who had rendered most notable services in promoting the independence and formation of our country, as a 'dirty little atheist.' By the same criteria most of the Fathers, certainly Franklin, Washington, Adams, Jefferson, Madison, Marshall, Morris and Monroe, were likewise 'dirty little atheists,' as they all shared the religious belief of Paine and most other intellectuals of the time, namely, either Unitarianism or Deism." (*Ibid.*)

Having a lively appreciation of the evils of bigotry in religion, the authors of the Constitution took care to prevent any popular effort to secure religious conformity by law. In 1796 an attempt to insert a "Christian" amendment in the Constitution was defeated. A speaker for the amendment referred to Washington's "atheistic proclivities," censuring his admiration for the works of Thomas Paine. Washington, as we know, during his second administration, assured the Mohammedans of Tripoli, through his diplomatic representative, that "the government of the United States is not in any sense founded upon the Christian religion"—a view later approved by

John Adams, who sent the treaty containing this statement to the Senate.

During the campaign for the presidency in 1800, Jefferson was widely attacked as a free-thinker. He was accused of disbelief in the conventional religion of his time, and so fearful were the orthodox of his infidel opinions that two pious ladies of New England, when they heard he was elected, buried their Bibles in the garden lest the terrible Jefferson send officers to confiscate the holy Scriptures!

It can hardly be urged that any "popular" meaning of religion was intended by the authors of the Constitution to be used in determining whether a man is religious or not. Rather, if there be any criterion at all of the quality of being "religious," it must be sought in some other quarter than prevailing custom and inherited belief.

The decision of the Circuit Court notes that the Selective Service Act was modified, during passage, to allow the classification in IV-E of men not members of any religious organization, yet rules against Berman on the ground that he was not affected in his resolve to be a conscientious objector by "religious training and belief." [R. 49.] But if, within the meaning of the Act, a man may be a religious objector to war without belonging to a specific religious organization, why may he not also obtain religious training and belief from non-organizational sources?

It has been shown that, from the earliest days of the Republic, numerous individuals, many of them illustrious figures in American history, obtained their moral and religious ideas from private study and reflection, and the quality of their religion became manifest in their lives.

Countless men of today similarly derive their religious inspiration from unorthodox faiths; indeed, it is often claimed as one of the glories of American achievement that in the United States such men are free to practice their own individual religion. Shall we now circumscribe this freedom with limiting definitions founded on the dogmas of prevailing orthodoxy? Shall we jettison the right of an individual citizen to define his own religion and to practice it, when it is not the character of the practice which is in dispute—the law provides for religiously inspired conscientious objection—but simply the doctrinal authenticity of his profession of religion?

The evidence is ample that the views of Herman Berman may qualify as a religion in the modern meaning of the term. Berman has said he is religious in his objection to war. Berman has nowhere been shown to be a liar. His sincerity has not been questioned. Thus, the conviction of Berman is tantamount to the assertion that he is a criminal before the law because he failed to adopt a familiar or dogmatic version of religion; that he is, in short, to be punished for doing his own religious thinking.

We cannot believe that this Court will allow this medieval requirement of religious conformity to stand. If Berman had been proved a wastrel, a hypocrite, or one whose opinions were shaped by a desire to escape military service from cowardice, or from sheer selfish disregard of his duties as a citizen, there might be some ground for claiming that he is not religious. But the evidence all points to the profoundly principled convictions on which Berman's opposition to war is based—convictions which guided his life from his school days up to the present.

It is not here maintained that the question of whether a man is religious or not can be simply determined. Fortu-

nately, this problem is seldom presented to the courts. But when such questions do arise, it is absolutely necessary, we submit, that the greatest of care be taken to protect that most crucial of the Four Freedoms—freedom of religion. A man's religion is his life. It is valued above life by the truly religious man. And the quality of a man's religion is best determined by reference to the quality of his actions and the consistency of his resolves.

In the case of Herman Berman, however, there is no great difficulty in determining the fact of his conscientious beliefs and their sustaining power in his life. The record of his career is not obscure. It is not even at issue in the contentions before the Court. The claim is simply that Berman's beliefs are not "religious." We reply that, under the circumstances of his action, and in consideration of the evidence, that this claim is without support and cannot be sustained.¹²

¹²Because lawyers have no special competence in a study of definitions of religion, and religious scholars may, we attach to this brief, as Appendix "D," a comment by Professor Walter George Muelder, Dean, Boston University, School of Theology, upon the opinion of the Circuit Court below. We incorporate this comment as part of our argument. Professor Muelder had attested to the petitioner's religious training and belief in a letter introduced in evidence below, set forth as Appendix "B" to this Petition. [Deft. Ex. "A."] For the Circuit Court's comment upon Professor Muelder's views, see Record at p. 43. Professor Muelder was formerly professor of Christian theology and Christian ethics, Graduate School of Religion, University of Southern California.

III.

The Trial Judge Did Not Review the Evidence Submitted to the Selective Service Agencies. Hence the Cause Should Be Remanded for a New Trial.

The factual support for the foregoing is set forth *supra* and is not repeated here.

IV.

The Sentence Imposed by the District Court Was Excessive and Improper; the Judgment Should Be Reversed and the Cause Remanded for Re-sentence.

At the time of sentence, the trial judge stated:

“The Court feels that this is one of the most flagrant cases that it has had before it; not only flagrant in the violation of the law but the attitude of this defendant.” [Supplemental Record p. 2, Proceedings on Sentence, Rep. Tr. for Dec. 18, 1944.]

It is submitted that there is nothing in the record in the instant case, either before the Selective Service agencies, or before the trial judge (unless, perchance, it is that the petitioner is a Socialist and the trial judge was prejudiced against Socialists)¹³ that warranted, or supported, the trial judge's statement, that the petitioner was “flagrant” in his attitude.

Throughout the trial the trial judge seemed to have acted arbitrarily. From his own statement it is reasonable

¹³Cf. *United States v. Carolene Products*, 304 U. S. 144, 152, 58 S. Ct. 778, 82 L. Ed. 1234 (1938), footnote.

to infer that he did not review the evidence submitted by the defendant to the Selective Service agencies. [R. 20.]¹⁴

Apparently the sentence imposed by the trial judge upon the defendant was the severest meted out by him, during a period of approximately four years, out of all of the Selective Service violators that came before him for sentence. (Cf. affidavit attached to Petition for Rehearing in the Circuit Court below.)

This Court has jurisdiction, in the exercise of its broad appellate jurisdiction, to make such disposition of the case as justice requires.¹⁵

The uncertainty in the law at the time of the sentence;¹⁶ ambiguities in the record, as to whether the trial judge did, or did not, review the record before the Selective Service authorities, and the further ambiguity and uncertainty as to any basis for the trial judge's observation that

¹⁴The trial judge, in other cases, involving conscientious objectors, and particularly Jehovah's Witnesses, imposed fines upon those seeking a jury trial, not upon those waiving a jury trial. *Newcomb v. United States*, 143 F. (2d) 586 (1944).

¹⁵Cf. *Patterson v. Alabama*, 294 U. S. 600, 608, 55 S. Ct. 575, 79 L. Ed. 1082 (1935); *McNabb v. United States*, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943); *Yosui v. United States*, 320 U. S. 115, 117, 63 S. Ct. 1392, 87 L. Ed. 1793 (1943).

See also: *Villa v. Van Schaick*, 299 U. S. 152, 155, 57 S. Ct. 128, 81 L. Ed. 91 (1936); *New York ex rel. Whitman v. Wilson*, 318 U. S. 688, 63 S. Ct. 840, 87 L. Ed. 1083 (1943); *Mathews v. West Virginia ex rel. Hamilton*, 320 U. S. 707, 708; *Walling v. Reuter, Inc.*, 321 U. S. 671, 676, 64 S. Ct. 826, 88 L. Ed. 1001 (1944); *Husty v. United States*, 282 U. S. 694, 51 S. Ct. 240, 75 L. Ed. 629 (1931).

¹⁶Cf. Justice Frankfurter's observations in *Estep* and *Smith* cases.

the "attitude" of the defendant was "flagrant," would warrant a resentence of the defendant.¹⁷

Wherefore, the petitioner prays that this Court grant a writ of certiorari; and thereafter order the judgment below reversed, or in the alternative, remand the cause for a new trial or for resentence.

Respectfully submitted,

A. L. WIRIN,

FRED OKRAND,

Attorneys for Petitioner.

¹⁷*Cf. Hysler v. Florida*, 315 U. S. 411, 427, 62 S. Ct. 688, 86 L. Ed. 932 (1942), and cases cited by Justice Black (dissenting) (in footnote 16) including *Villa v. Van Schaick*, 299 U. S. 152, 57 S. Ct. 128, 81 L. Ed. 91 (1936); *State Tax Commission v. Van Cott*, 306 U. S. 511, 59 S. Ct. 605, 83 L. Ed. 950 (1939); *Minnesota v. National Tea Co.*, 309 U. S. 551, 60 S. Ct. 676, 84 L. Ed. 920 (1940).

APPENDIX A.

LETTERS CONTAINED IN THE DRAFT BOARD FILE IN
BEHALF OF APPELLANT'S CONTENTION THAT HE
WAS A CONSCIENTIOUS OBJECTOR.

1907 Escarpa Drive
Los Angeles, Calif.
September 27, 1942

To Whom It May Concern:

Herman Berman has been known to me for about two years and I am convinced that he is a sincere conscientious objector. I believe this because of his devoted work for peace, prior to the declaration of war, because of the fine friends he has who believe in him, and because conversation with him impresses me with his honesty.

I think it was the purpose of the conscientious objector clauses of the Selective Service Act to exempt just such earnest objectors. Herman Berman, I feel sure, will not fail to serve his country intelligently and constructively in a Civilian Public Service Camp and after the war.

Yours respectfully,

(Mrs. John) (signed) HELEN MARSTON BEARDSLEY

20 Gramercy Park
New York City
October 19, 1942

Selective Service Local Board or
Other Competent Authority:

This letter will testify to the fact that I have known Herman Berman for some years.

I have never discussed specifically with him his position on war but I have known of his deep sincerity. He holds

his convictions with religious fervor and he tries to make his conduct conform to his convictions. It is to this quality of sincerity that I am bearing witness.

Truly yours,

(Signed) NORMAN THOMAS

FIRST UNITARIAN CHURCH
2936 West Eighth Street
Los Angeles, California
September 14, 1942

To Whom It May Concern:

The undersigned has known Mr. Herman Berman for the past two and one-half to three years, and has had several conversations with him on the subject of peace and war.

Mr. Berman has been a consistent Conscientious Objector throughout that period and, as far as I have been able to determine, his views are based upon a conviction and are not due to lack of courage or cowardice. Mr. Berman is willing to undertake any duties that may be assigned to him, looking to his country's welfare, but his conscience is such that he declines to take up arms to kill another human being.

My own respect for Mr. Berman's views is enhanced by the fact that while I am opposed to war, I see it sometimes as a necessity, and at the present moment have two sons in the armed forces. Consequently, my support of Mr. Berman's position is not contingent upon sharing his views.

Yours truly,

(Signed) ERNEST CALDECOTT

Minister

September 5, 1942

To Whom It May Concern:

I have known Herman Berman several years, since we have membership together in two or three organizations, and I have found him devoted to worthy objects of human service.

In many conversations with him, and in certain group discussions, I have come to know that he is conscientiously opposed to war, and to my knowledge he has held these convictions over a period of years. I am certain that these convictions are fundamentally based on religious beliefs, even though he is not attached to our particular church.

There is no doubt in my mind that he is entitled to the classification of 4-E and should be given the opportunity of carrying on some work of national importance under civilian directions instead of military service.

Very truly yours,

(Signed) HAROLD SLOCUM
Associate Minister.

Mt. Hollywood Congregational Church
Prospect Avenue and Rodney Drive
Hollywood, California

September 5, 1942

To Whom It May Concern:

Herman Berman, 5124½ DeLongpre Avenue, Los Angeles, I have known a little more than two years. I have had several talks with him and have observed him rather closely and am convinced that he is a young man of real sincerity, unequivocally devoted to constructive purposes and at the same time determined not to take part in war.

My impression is that his conviction against the war method and for non-violent methods of action is deep-rooted. It is my job as a pastor to sense by intuition and by conversation with people how deeply rooted their conscience and convictions are and so I feel somewhat qualified in the case of Herman Berman to say that my estimate of his character would not be a casual one but would rather be a serious one, with a basis of experience to support it. My estimate is that he is not only sincere. He is also the kind of young man that has definite ability and will power and this ability and will power he apparently wants to dedicate to a way of living that will help mankind and promote the highest ideals of this country.

Herman Berman is not a member of any church but he is, I believe, willing to give his life in service to man. There might be a question in the minds of some as to whether or not this is a religious attitude. I, myself, am convinced that the depth of his conviction attested by the kind of life he has been living with a good deal of consistency justifies me in saying that to me as a pastor this young man is entitled to a 4-E classification. If I had any question about this I would not say it, since the cause to which I am ordained would not be benefited by any sentimentality on my part.

Sincerely,

(Signed) ALLAN A. HUNTER
Minister.

Mt. Hollywood Congregational Church
Prospect Avenue and Rodney Drive
Hollywood, Calif.

APPENDIX B.

LETTER FROM PROFESSOR WALTER G. MUELDER, TESTIFYING TO APPELLANT'S RELIGIOUS TRAINING AND BELIEF.

January 15, 1944

Mr. Huntington P. Bledsoe
Federal Building
312 North Spring Street
Los Angeles

My dear Mr. Bledsoe:

I have been asked by Mr. Herman Berman to send you at this time a letter stating my opinion regarding the sincerity of his conscientious objection to war and regarding the religious character of the consciousness.

Mr. Berman is a Socialist, and like many Socialists is unalterably opposed to war and to methods of violence. He has a deep sense of reverence for life and for the sacredness of personality. Like most socialists that refuse to participate in so-called "capitalistic" wars, he affirms that the dominant economic system inevitably fosters war along with its ruthless competition, exploitation of persons, class conflict, and imperialism. His reaction is not simply one of political or economic displeasure, but a total spiritual protest against the war system and all its causes along with a wholehearted commitment to a society which shall be thoroughly democratic. There is no doubt in my mind that Socialism is a way of life for Mr. Berman and is pursued with no ulterior motives.

Is such conscientiousness religious? For over a hundred years movements of a deeply spiritual type have existed in western civilisation, which have broken with traditional theistic credos and formulations. August Comte was the

founder of a group which practiced the Religion of Humanity, though rejecting ordinary theological categories. Standard works in religious philosophy recognize as religious the Ethical Culture Society founded by Felix Adler. The eminent American psychologist of religion, Edward Scribner Ames, in *The Psychology of Religious Experience* defines religion as "the consciousness of the highest social values." In his book, *A Common Faith* (p. 27), John Dewey says: "Any activity pursued in behalf of an ideal and against obstacles and in spite of threats of personal loss because of conviction of its general and enduring value is religious in quality." This outstanding American philosopher says on the previous page: "Faith in the continued disclosing of truth through directed co-operative endeavor is more religious in quality than is any faith in a completed revelation."

Those of us who work professionally and academically in the field of religion simply have to recognize humanism as a type of religious expression, though many sects and churches would brand it as atheistic and therefore irreligious. For increasing thousands of persons in our western culture some type of naturalistic humanism sensitive to human values and to social responsibility and to a more cooperative society has religious value. I would have to rule outside the pale of religion some of our most outstanding American clergymen if I did not recognize as religious in men their commitment to what is for them supremely worthful. As I have come to know the mind and activities of Herman Berman, I would quickly classify his Socialism and his conscientiousness as religious. He is not simply opposed to this war, but to any war.

It is interesting to note in the Kauten Case a recognition of the general situation which I have sketched above. The Court said:

"The provisions of the present statute take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis for exemption. . . . A compelling voice or conscience . . . we should regard as a religious impulse. . . .

"There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."

I hope these paragraphs will aid in clarifying the point that as a conscientious objector Mr. Berman is a religious objector in a currently acceptable meaning of the term religious.

Very truly yours,

(Signed) WALTER G. MUELDER
Professor of Christian Theology
and Christian Ethics
Graduate School of Religion
University of Southern California

APPENDIX C.

What Is Religious Training and Belief?*

We must look, for the basis of a sound interpretation, into the definitions of religion. Even the scantiest of looks indicates the tremendous varieties of religious experience and therefore the wide variation in definition. A common denominator can be reached by saying that religion is an individual's theory of his relation to the universe and to other individuals in it. In this sense, religion is an attitude or conviction from which flows definite actions, which may include joining with others who share this conviction in a church or sect. That the absence of this joining indicates absence of religion does not follow.

This subjective quality of religion has been emphasized by many great men. The most famous statement of it is by Jesus, "The kingdom of God is within you." Emerson's "God builds his temple in the heart on the ruins of churches and religions" is another. "The positive content of religion," says Edward Carpenter, "is the intuitive sense—whether conscious or subconscious—of an inner unity and continuity with the world around."

If the religious belief is subjective and intuitive, it follows that religion can have no universal creed, no single universal belief, even belief in God. Anthropologists and historians bear this out. So does the New International Encyclopedia in dividing definitions of religion into two classes:

"The first class defines religion as an attitude of conduct and life directed towards a power without. . . . It is

*Pamphlet published by War Resisters League.

possible, however, to consider the essence of religion as experience without regard to the object towards which it is directed. . . . A common definition of this case is, 'Religion is that to which a man attaches supreme value; that which he would rather die than give up.' "

Based upon such a definition of religion, an inner conviction of the supreme value of human life—a conviction so strong that one is willing to defy all pressures, even to die, in order to maintain and fulfill it—is a religious belief.

It may be asked whether, if religion be defined so subjectively, there can be any objective measurement at all? How can one distinguish between a man of religious belief against war and a man of mere disinclination or of timidity?

The objective measurement of religious belief can be, and many religious men have held that it must always be, one of conduct. The Quakers, whose members subscribe to no creed, whose church has no body or dogma, have evidenced the religious nature of their opposition to war by their conduct during three centuries. "We believe," said one of their members recently, "that religion is 99% conduct." William Penn expressed it in these words:

The humble, meek, merciful, just, pious and devout souls are everywhere of one religion, and when Death has taken off the mask they will know one another though the diverse liveries they wear make them strangers.

Others among our country's founders were of this opinion. "My religion is to do good," wrote Tom Paine. "I think," said Benjamin Franklin, "vital religion has always suffered when orthodoxy is more highly regarded

than virtue: and the Scriptures assure me that at the last day we shall not be examined on what we *thought*, but by what we did; and our recommendation will not be that we said, 'Lord! Lord!', but that we did good to our fellow creatures." Thomas Jefferson's lofty spirit shines through the letter written to a friend (Miles King) in which he, too, defines religion as "doing":

He (God) has formed us moral agents . . . that we may promote the happiness of those with whom He has placed us in society, by acting honestly towards all, benevolently to those who fall within our way, respecting sacredly their rights, bodily and mental, and cherishing especially their *freedom of conscience*, as we value our own. I must ever believe that religion substantially good which produces an honest life, and we have been authorized by One whom you and I equally respect, to judge of the tree by its fruit. Our particular principles of religion are a subject of accountability to our God alone. I inquire after no man's, and trouble none with mine; nor is it given to us in this life to know whether yours or mine, our friends' or our foes', are exactly the right. Nay, we have heard it said that there is not a Quaker or a Baptist, a Presbyterian or an Episcopalian, a Catholic or a Protestant in Heaven, that, on entering that gate, we leave those badges of schisms behind and ourselves united in those principles only in which God has united us all.

Perhaps we need ask nothing more than that these words of Thomas Jefferson be hung in the offices of every draft board in the country. They sum up the belief of some of our founders that religion is not merely a sec-

tarian activity, nor even a matter of membership. If the test of religion were the latter, Abraham Lincoln, who never joined openly a church, would have failed it. Yet who could doubt that he was a deeply religious man?

The Shorter Oxford English Dictionary defines religion as "devotion to some principle; strict fidelity or faithfulness; pious affection or attachment." (*Oxford*, Vol. II, p. 1933.)

Among the definitions of the word "religious" given in Webster's New International Dictionary, 1934 edition, are the following: (1) manifesting devotion to, or the influence of, religious, pious, godly; (2) scrupulously faithful or exact; strict; conscientious, zealous; fervent; devout.

The Century Dictionary defines religion as "a sense of duty," and quotes Latimer in one of his sermons as saying, "For *religion*, pure *religion*, I say standeth not in wearing of a monk's cowl, but in justice, righteousness, and well doing." Matthew Arnold is quoted as stating, ". . . the passage from morality to religion is made when to morality is applied emotion." (Vol. VIII, p. 5063.)

The New International Encyclopedia declares, "It is possible, however, to consider the essence of religion as *experience without regard to the object toward which it is directed.*" (Italics supplied.) (2nd Edition, Vol. 19, p. 679.)

Another source for the definition of religion is the Dictionary of Doctrinal and Historical Theology, "Religion is primarily a matter of practice, and it is sufficient for a religious system that it supplies motives enough to secure practical adherence, whether it be open to speculative objections or not." (2nd Edition, p. 632.)

Ames, Coe, King, and others, according to the *Encyclopedia Americana*, "looking for a definition of religion in terms of values, regard religion as a process in which values of a distinctly social character are heightened and intensified." (1941 Edition, Vol. 23, p. 349.)

The Dictionary of Philosophy and Psychology considers religion "the love of a person, or devotion to an idea, (which) may apparently produce the peculiar religious effect . . . so that it has for us a value of necessity exceeding all other elements of life put together, seems to coincide with traditional and philosophical idea of religion." (Pp. 455-456.) This reference continues, "a man's real religion, it may be said, is that set of objects, habits, and convictions, whatever it might prove to be, which he would rather die for than abandon. . . . It would follow from this that his actual religion may differ in any degree from his nominal creed." (P. 456.)

The Epistle of James, Chapter 1, Verse 27, is as follows, "Pure religion and undefiled before God and the Father is this, To visit the fatherless and widows in their affliction, and to keep himself unspotted from the world."

The Hebrew prophet, Micah, records in the Book of Micah, Chapter 6, Verse 8, that "It hath been told thee, O man, what is good, And what the Lord doth require of thee: Only to do justly, and to love mercy, and to walk humbly with thy God."

The views of Hillel, the great Jewish scholar and Rabbi, and contemporary of Jesus, are summarized in the Jewish Encyclopedia as "Love of man was considered by Hillel as the kernel of the entire Jewish teaching. When a heathen who wished to become a Jew asked him for a summary of the Jewish religion in the most concise terms,

Hillel said, 'What is hateful to thee, do not to thy fellow man: This is the whole law; the rest is mere commentary.' " (Vol. 6, p. 398.)

PHILOSEPHERS VIEW RELIGION

In order to get a more adequate understanding of religion, we should also consider it from a historical point of view. The philosopher, often a rebel against an established religion, often becomes the founder of a new religion. Therefore, the insights of well-known men are particularly valuable for our consideration.

Immanuel Kant treats this subject thoroughly in his book *Religion Within the Limits of Reason Alone*. He writes, "This ideal of a humanity pleasing to God . . . we can represent to ourselves only as the idea of a person who would be willing not merely to discharge all human duties himself and to spread about him goodness as widely as possible by precept and example, but even, though tempted by the greatest allurements, to take upon himself every affliction, up to the most ignominious death, for the good of the world and even for his enemies." (Pp. 55-56.) He further says, "These are representations powerful enough . . . to awaken in the other the voice of conscience commanding them still to break with evil so far as it is possible. . . ." (P. 63.)

Kant clearly distinguishes between formal religious faith and "religious belief" when he writes, "This religion . . . is which in instructing us also animates us with basic principles for action, and wholly subjects whatever Scripture may contain for historical faith to the rules and incentives of *pure moral faith, which alone constitutes the element of genuine religion* in each ecclesiastical faith." (Italics supplied.) (Same as previous.)

He further states that the founder of the first true church claims first "that not the observation of outer civil or statutory churchly duties but the pure moral disposition of the heart alone can make man well-pleasing to God . . . that, for example, to hate in one's heart is equivalent to killing; that injury done to one's neighbor can be repaired only through satisfaction rendered to the neighbor himself, not through acts of divine worship. . . ." (Same as previous, p. 147.)

A humanization of the idea of God in "religious belief" is expressed by August Comte, the father of Sociology, "Humanity, therefore, becomes for the individual the object of religious adoration. . . . 'Our thoughts will be devoted to the knowledge of humanity, our affections to her love, our actions to her service.'" Comte sums up this point of view when he writes, "Religion . . . finds its actual expression in the active service of Humanity." (*A. Seth Pringle-Pattison, The Idea of God*, pp. 139-140.)

John Stuart Mill in his *Three Essays on Religion* parallels Comte's analysis when he writes, ". . . the essence of religion . . . is the sense of unity with mankind, and a deep feeling for the general good, may be cultivated into a sentiment and a principle capable of fulfilling every important function of religion and *itself justly entitled to that name*. . . ." (Italics supplied.) (Pp. 109-110.)

The view that religious belief is not dependent upon the idea of God but more upon identification with "the whole" is expressed by Bosanquet when he writes that the religious consciousness is "the recognition by the finite of its 'true being' and of its 'union with the whole'; the insight into 'the impossibility of its finding peace otherwise than as offering itself to the whole.'" (*A. Seth Pringle-Pattison, The Idea of God*, p. 290.)

George Santayana agrees with some of these ideas when he writes, "True religion is entirely human and political. . . ." (*The Life of Reason—Reason in Religion*, Vol. 3, p. 276.) ". . . in this sense the religion of humanity is the only religion, all others being sparks and abstracts of the same." (Same as previous, p. 190.)

Henri Bergson defines one type of religion as an "open morality" which transcends particular social groups, for he writes of men who seek a "wide-open" soul and to "a love which embraces all mankind . . . they add the obligation of aspiration—aspiration on the part of others toward the new level of life which they exemplify . . . they add the religion of creative oneness with the principle of all life, issuing in a surge of unbounded love. . . ." (*Edwin A. Burt, Types of Religious Philosophy*, p. 414.)

The concept of God as Truth is revealed by Professor Alfred North Whitehead's statement that ". . . a religion, on its doctrinal sides, can thus be described as a system of general truths which have the effect of transforming character when they are sincerely held and vividly apprehended." (*Julian S. Huxley, Religion Without Revelation*, p. 150.)

The view that truth is the religion of the scientist is explained by Robert Andrews Millikan, the American physicist, as he writes, ". . . for there is another kind of religion—a religion which keeps its mind continually open to new truth . . . that eternal truth has been discovered in the past, that it is being discovered now, and will continue to be discovered." (*Evolution in Science and Religion*, p. 81.)

John Dewey gives a most comprehensive and analytical treatment of the subject of religion in his book, *A Com-*

mon Faith. He states, "It is widely supposed that a person who does not accept any religion is thereby shown to be a non-religious person. . . . I believe that many persons are so repelled from what exists as a religion by its intellectual and moral implications that they are not even aware of attitudes in themselves that if they came to fruition would be genuinely religious." (P. 9.)

Dewey believes that ". . . the adjective 'religious' denotes nothing in the way of specifiable entity, either institutional or as a system of beliefs." (Same as previous, p. 9.) He points out that "*The actual religious quality . . . is sometimes brought about by devotion to a cause . . . sometimes as was the case with Spinoza—deemed an atheist in his day—through philosophical reflection.*" (Same as previous, p. 14.) Dewey clearly specifies that "*Any activity pursued in behalf of an ideal and against an obstacle, and in spite of threats of personal loss because of conviction of its general and enduring value is religious in quality.*" (Same as previous, p. 27.) "*The positive lesson is that religious qualities and values if they are real at all are not bound up with any single item of intellectual assent, not even that of the existence of the God of Theism.*" (Italics supplied.) (Same as previous, p. 33.)

Several attempts to define religion have been made as follows:

"Religion is the vision of something which stands beyond, behind and within, the passing flux of immediate things; something which is real, and yet waiting to be realized; something which is a remote possibility, and yet the greatest of present facts; something that gives meaning to all that passes, and yet eludes apprehension; something whose possession is the final good, and yet is beyond

all reach; something which is the ultimate ideal, and the hopeless quest." (*Alfred North Whitehead, Science and the Modern World*, p. 275.)

"Religion (in these highest forms) is the interpretation both of the eternal and of the spirit of loyalty through emotion, and through a fitting activity of the imagination." (*Josiah Royce, The Philosophy of Loyalty*, p. 377.)

"Whoever finds his loyalty, so that life means not grasping what the self can get but giving to some worthy end what the self can expend, has found an authentic religious experience." (*Harry Emerson Fosdick, As I See Religion*, p. 16.)

Religion is that aspect of a person's experience, including his thought, feeling, and actions, whereby he endeavors to live in relationship with what he deems to be the divine, i. e., the worthful power controlling the world.—(*Hume.*)

Religion is man's reasoned thought about the universe of which he is a part, the emotions evoked by that thought, and the conduct in which it issues.—(*Craig.*)

Religion is man's feeling reaction to the idea of the great all-encompassing, all-penetrating whole to which he belongs.—(*Muirhead.*)

Religion is belief in a power not ourselves which makes for righteousness and the desire to come into harmonious relations with that power.—(*Adapted from Arnold.*)

RELIGION AS VIEWED BY SCIENTISTS.

Although scientists are not ordinarily considered as interpreters of religion, there is no doubt that many are deeply religious and have attempted to interpret religion in the light of their specialized fields.

For instance, William James states in his famous book *Varieties of Religious Experience* that "Faith in God is at bottom a conviction that the best things in the universe are the more eternal things, and that our present lives are enriched by holding to this conviction. . . ." (*Edwin H. Burt, Types of Religious Philosophy*, p. 414.) He also stated that religious attitudes must have "some object of the experience" which he designated as "the Divine," warning that "we must interpret the term 'divine' very broadly as denoting any object that is godlike *whether it be a concrete deity or not.*" (Italics supplied.) (*John M. Moore, Theories of Religious Experience*, p. 34.) And again from his own book—"Religion consists in the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatsoever they may consider the divine."

Julian Huxley goes on to say that religion is not essentially believing in God or obedience to his commands or will, but "a way of life art like other kinds of living . . . which must be practiced like other arts if we are to achieve anything good in it." (*Religion Without Revelation*, p. 174.)

Albert Einstein describes the development from a religion of fear to a moral religion, but sees the culmination of religious belief in his attitude, ". . . there is a third stage of religious experience which belongs to all of them even though it is rarely found in a pure form, and which I will call cosmic religious feeling. It is very difficult to explain this feeling to anyone who is entirely without it, especially if there is no anthropomorphic conception of God corresponding to it. . . . He looks upon the individual existence as a sort of prison and wants to experience the universe as a single significant whole. . . .

The religious geniuses of all ages have been distinguished by this kind of religious feeling, which knows no dogma and no God conceived in man's image; so there can be no church whose central teachings are based on it. Hence it is precisely among the heretics of every age that we find men who were filled with the highest kind of religious feeling, and were in many cases regarded by their contemporaries as atheists, sometimes also as saints." (*The World as I See It*, p. 264.)

Sir Arthur Eddington goes so far as to disclaim the necessity of a belief in God in order to be religious. As he points out—"For this reason I do not attach great importance to the academic type of argument between atheism and deism. At the most it may lead to a belief that behind the workings of the physical universe there is need to postulate a universal creative spirit, or it may be content with the admission that such an inference is not excluded. . . . Religion does not depend on the substitution of the word 'God' for the word 'Nature.'" (*Science and the Unseen World*, pp. 68-72.)

Eddington also has something to say about the place of creeds in religion: "Rejection of creed is not inconsistent with being possessed by a living belief. We have no creed in science, but we are not lukewarm in our beliefs. The belief is not that all the knowledge of the universe that we hold so enthusiastically will survive in the letter; but a sureness that we are on the road. If our so-called facts are changing shadows, they are shadows cast by the light of constant truth. So too in religion we are repelled by that confident theological doctrine which has settled for all generations just how the spiritual world is worked;

but we need not turn aside from the measure of light that comes into our experience showing us a Way through the unseen world." (Same as previous, pp. 90-91.)

SOME CONTEMPORARY THINKERS VIEW RELIGION

George Bernard Shaw has written that "That which binds men to one another (is religion) and irreligion that which sunders." (*Harry Emerson Fosdick, As I See Religion*, p. 2.)

Harry Emerson Fosdick believes that "Religion is essentially the release of life through its committal to the highest that we know. . . . Whenever anybody finds any goodness, truth or beauty concerning which he feels, not that it should give itself to him, but that he should give himself to it and be its loyal servant, that man has entered an authentic religious experience."

Henry P. Van Dusen, a well-known theologian, sees religion not as a set of dogmatic beliefs or theological concepts but as the total reaction of the person to the totality of living, and powerfully expresses this when he writes, "Religion is interwoven with the very nature of man's being, the great understandings and certainties of faith—all of them—are implicit in life. Entrance into its presence is through eagerness, earnestness, honesty of seeking; and through integrity, daring, fidelity of living." (*Reality and Religion*, p. 30.)

Dr. John Haynes Holmes, minister of Community Church, quotes Professor Nathaniel Schmidt, as he seeks to adequately describe religion in his book *The Sensible Man's View of Religion*. "Religion is a mood of behavior, a will to live in a particular way. . . . Religion is in the last analysis a devotion to the highest.

. . . It is the direction of the mind toward what is conceived to be the highest truth, of the will toward the highest duty, the chief thing to be done. . . . Religion is the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands." (P. 11.) Dr. Holmes' own thought is, "Religion is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best." (*New Churches for Old*, p. 119.)

A leading teacher of religious education, Georgia Harkness of Garrett Biblical Institute, effectively presents the case for a religion based upon a meaningful life rather than lip service to creeds. She writes, "Religion means fundamentally faith in a meaningful existence—a faith which, far more than the dicta of creeds, has been shattered in our day. The way to recover this faith is to recognize that a meaningful existence implies *wholeness*—the integration of life about a center with radii extending in proper balance to every aspect of life." (*The Recovery of Ideals*, p. 30.)

Crawford Howell Toy writes, "Religion is a man's attitude toward the universe regarded as a social and ethical force; it is the sense of social solidarity with objects regarded as Powers, and the institution of social relations with them." (*Introduction to the History of Religions*, p. 1.)

Romain Rolland is quoted by Anup Singh as saying, "(Religion is) search for truth at all costs with single-minded sincerity prepared for any sacrifice—faith in an end to human effort higher than the life of existing society, and even higher than the life of humanity as a whole." (*Anup Singh, Nehru, the Rising Star of India*, pp. 124-5.)

The idea that it is the *devotion* and *dedication* to an object rather than the *object* that is the essence of religion is clearly expressed by Walter M. Horton when he writes, "Indeed it may be said that anyone who has found something to live for, something to serve with disinterested devotion, something that is his joy and pride . . . has found his God." (*God*, p. 11.) The expression of this devotion to God is through human relations, as envisaged by Horton. "We are very near to God whenever we try to do anything well, and reach out for the needed 'inspiration'; and we are very near to God whenever we enter into relations of mutual aid and affection with our fellowmen. . . ." (Same as previous, p. 58.)

"To be religious, as a personal experience, is to take a total attitude toward the universe. It is to comprehend one's relation to the divine, however the divine be conceived. The objects of veneration have had a different meaning for different individuals, groups, and generations. But whatever be the conception of the divine object, the religious attitude seems to have this stable feature: It is always an awed awareness on the part of the individual of his relation to that "something not himself," and larger than himself, with whom the destinies of the universe seem to rest. This somehow sensed relation to the divine appears throughout all the varieties of religion that have appeared in the world, and among many individuals not popularly accounted religious." (*Irwin Edman, Human Traits and Their Social Significance*, pp. 280-2.)

"What does a man secretly admire and worship? What haunts him with the deepest wonder? What fills him with

most earnest aspiration? What should we overhear in the soliloquies of his unguarded mind? This it is which, in the truth of things, constitutes his religion." (*James Martineau, Endeavors After the Christian Life*, p. 222.)

This way of service is open to all men for . . . there are many paths to the presence of God, conventional and unconventional, various enough so that men of every temperament can find their way to him from where they are." (Same as previous, p. 63.)

The Rabbinical Assembly of America states, "In the light of the very nature of religion, we affirm that the discussion of problems of social and economic justice and the evaluation of movements to abolish exploitation, poverty, war, and other social evils are not only legitimate, but even necessary concerns of the synagogue."

Rabbi Robert Gordias, Professor at Jewish Theological Seminary, writes, "The first objective of the church must be to sensitize the human conscience to injustice and its consequences."

Rabbi Maurice N. Eisendrath notes that "From Abraham's query, 'Shall not the Judge of all the earth do justly,' through Moses and Job, down to the last of the hasidic rabbis and Berditshevski, the emphasis of Jewish thought and teaching, principle, precept, and practice has been upon justice. . . . It was this concept which became not merely *one* aspect of ancient Judaism, but the *chief* desideratum of our ancestors' religious system, and the more profoundly religious knowledge penetrated into the life of the ancient Hebrew, the more weight was laid

upon this *single* consideration, until the literary prophets crystallized the concept by declaring that religion and the knowledge of God were identical with Social Justice."

. A GOVERNMENT OFFICIAL'S VIEWPOINT

"It is my feeling that each case must be considered individually and that no presidential appeal decision can be considered as a binding precedent. In each case I must be satisfied that the objection is based on 'religious training and belief' which contemplates recognition of some source of all existence which, whatever the type of conception, is Divine because it is the Source of all things. Religious belief, however, is more important than 'training' because we are too prone to have the schoolmaster in mind and hours, days, weeks, years of study when we weigh the meaning of training. Even there, one gets it by the long processes—another by 'cramming.' Does he get it? That's the question. If so, it involved training of some kind. I have some doubt about absorption through 'bolts from the blue' even though I do not toss aside entirely St. Paul's experience on the Road to Damascus. These are the exceptions and probably he had a lifetime of training crammed into that one hour. Somewhere I think the record will tell the story satisfactorily in the given case whether it is in the form of long-drawn-out processes of schoolmaster training or otherwise. Which-ever it is, the weight of the evidence is strengthened or diminished in consideration of all the facts." (*Letter by Lewis B. Hershey, Director, Selective Service System, to the Department of Justice, March 5, 1942.*)

RELIGION AS DEFINED BY A COURT

Religion has been judicially defined as follows: "In its primary sense (*religere*, to rebind, to bind back) it imparts, as applied to moral questions only a recognition of a conscientious duty to recall and obey restraining principles of conduct, in such a sense we suppose there is no atheist who will admit he is without religion." (*Supreme Court of California*, 1881, *Hinckley*, Vol. 58, Cal. 457, p. 512.)

(Grateful acknowledgment is made to the following for their help in editing or contributing to this compilation: Winston Dancis, Jessie Wallace Hughan, Abraham Kaufman, Morris Keeton, Robert F. Leavens, Ruth E. MacAdam, Frank Olmstead, Ernest Allyn Smith, Eleanor Taylor, and the Ahimsa Peace Team.)

APPENDIX D.

Comment on Opinion of United States Circuit Court of Appeals for the Ninth Circuit on the Case of Herman Berman vs. United States.

By WALTER GEORGE MUELDER, Dean and Professor of Social Ethics, Boston University School of Theology, Boston, Massachusetts.

In a case like that of Herman Berman material justice requires some appreciation of the dynamic development of the meaning of religion in the United States. It is a purely formal technicality which would read a particular view of religion into the Constitution of the United States as of the date of the First Amendment and then force all subsequent religious experience into the Procrustes bed of that view. Some of the signers of the Declaration of Independence and the Constitution were deistical in their beliefs. A study of the Deistical Society, certainly a religious group, shows that its authority was essentially rationistic and not supernaturalistic and authoritarian. I tried to show in my letter to Mr. Bledsoe, which appears in Appendix "B" to this brief (and in the brief before the Court of Appeals), that whole sections of organized Christianity today hold to a humanistic conception of religion. The quotation from Prof. John Dewey was not cited as an expression of my personal religious belief, but as a conception rather widely held in our American culture, one which it would be unfair and arbitrary to dismiss. Those of us who have scholarly responsibilities in the field of religion are compelled by the anthropological and historical facts to include persons like Herman Berman as religious. It is, therefore, of the utmost importance that the courts take full account of social facts if they are to

guard the justice of the community and the religious liberty of its citizens.

In an area as controversial as religion, the standard dictionaries are not of much help. For precision it is necessary to consult a wider range of scholarly works.

The paragraph of page 7 (of the Circuit Court's opinion) beginning "Yet all discoveries . . . etc.," is an interesting and significant expression of the faith of the persons concurring in the opinion rendered by the Court. But it is nevertheless an unfair assumption of fact regarding thousands of men who do not possess that type of "fox hole" religion and for whom conscience and national patriotism comprised the resources when strength flagged and courage was tempted to wane. Many were undoubtedly sustained by the same type of religious humanitarianism which Herman Berman espouses. The judges simply beg the question when they assume the supernaturalistic fact as the frame of reference for faith.

But if this paragraph were true, the judges should have drawn a different conclusion regarding Berman. If God directly is involved to "satisfy the soul hunger" and "to understand the daily joys and sadnesses and disappointments of life," then a person with as steady a loyalty and as steady a faith in human service, especially in the face of hardship, as Berman's record indicates, must at least be credited with being sustained by the "supreme power" whether he calls upon him directly or not. The faith is religiously effective. In a God-guided universe every event is theologically significant. The conscience of Herman Berman can be no exception. Men do not gather grapes from thistles. Conscientiousness is a spiritual fact, a primary empirical datum; the theological interpretation or definition of religion must respect the fact.

I shall now cite several recent scholarly works which recognize the type of attitude which Berman takes towards life as religious. Dr. Nels F. S. Ferre, Abbott Professor of Christian Theology, Andover Newton Theological Seminary, in *Faith and Reason* (Harper's, 1946), says: "Religion we have defined as our normally necessary whole—response to what is considered to be most important and most real" (p. 29). "Theology," he goes on to say, "is the interpretation of all our actual choices—how we treat persons, property, ourselves, our talents, how we live all in all—in the light of the inescapable reality to which we must react and keep reacting" (p. 133).

In *Types of Religious Philosophy* (Harper's, 1939), E. A. Burttt devotes fifty-eight pages to "Humanism." He shows that it is one of the great assumptions of humanism that devotion to sharable social goods makes for integrated personality and is the essence of religion (see p. 407). Burttt's comment on the historical setting of humanism is important: "On the one hand, many of its adherents are humanists because they feel humanism to be the inevitable outcome of all the forces which have been progressively working in modern times toward a more liberal religious orientation. They have seen Catholicism give way, in many areas of the modern West, to classical Protestantism, and they have seen orthodox Protestantism itself replaced by modernism. Humanism represents to them essentially a natural further advance in the same evolutionary movement; it is a radical and more consistent development of the principles which modernism has cautiously and tentatively trusted. It is the intellectual interpretation of the kind of religious experience that men find themselves sharing when the forces already expressed in the distinctive attitude of Protestantism, and

rendered bolder and more self-conscious in modernism, are allowed full and unhindered expression. The presence among humanist leaders of a number of Unitarian ministers and theologians is to be accounted for by this fact" (pp. 351-352). One of the intellectual factors in this position is a "profound respect for modern science and a whole-hearted acceptance of its essential postulates—that the universe is a non-providential, law-abiding order and that the ultimate court of appeal in the quest for truth is present empirical fact" (p. 353). Another assumption involves a revision of the scale of religious values as seems to be required by the commitment to science. "This revision involved a concentration on those moral and social ideals that appeared to be harmonious with science, and an abandonment of the rest as religiously irrelevant" (p. 353). From these considerations humanists press to the following point regarding the essence of religion (a point which is not adequately faced by the majority opinion in the case at hand): "If we are in earnest in our commitment to empirical method with its appeal to present psychological fact, and if we really mean that the essence devotion to a supreme ideal, then in strict logic it is permissible to convert this definition and affirm that whatever is empirically discovered to perform this function for men and women is religious" (p. 356; cf. J. Dewey, *A Common Faith*, pp. 13-17).

As a student of religious movements and institutions I do not wish to comment here on whether humanism represents the true faith or metaphysics. But what is absolutely essential to the protection of material justice is that the restricted definition of religion used by the Court not be the exclusive and determinative conception. *The religious adjustment of thousands of persons is no longer supernatural.*

FILE COPY

U.S. - Supreme Court, U. S.
FILED

DEC 11 1946

CHARLES ELWOOD HOPLAY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 538

HERMAN BERMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON HABEAS CORPUS

A. L. WILKIN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 538

HERMAN BERMAN,

vs.

Petitioner,

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON CERTIORARI

Preliminary

The Government in its brief in opposition to certiorari concedes that (p. 14) "there is a conflict in principle between the Ninth Circuit's (the Court of Appeals below) interpretation of the conscientious objector's exemption (under Section 5 (g) of the Selective Training and Service Act) and the broad construction that the Second Circuit has given to that provision".¹

¹ The court below expressly acknowledged that conflict, and freely stated that it took "divergent views from those expressed in these cases" (R. 39). Judge Denman stated that the decision of the majority "on this important question of law is in conflict with the decision of the Second Circuit in

In the face of such a direct conflict, on an important question arising out of a Federal statute of wide application² this Court would ordinarily not hesitate to grant certiorari—particularly where the issue of religious freedom lies in the background of the case, as it does here.

The Government takes the position however, in effect, that the court below, sitting *en banc*, was in error in deciding the question (p. 15) “whether an objector to war whose objections do not stem from a sense of responsibility to divine authority is exempt from service”—an issue expressly ruled upon by the court below, and decided in direct conflict with decisions of the Second Circuit. Hence, argues the Government in its brief, this Court, in this case, “need not reach the (that) question which the court below decided” (p. 15).

And this is so, it is urged, because the administrative decision as to the petitioner “was grounded upon an interpretation of the statute which was entirely consistent with the decision of the Second Circuit” (p. 15), because, so the Government claims, the “triers of the facts found that he (the petitioner) was a political objector, not a conscientious objector” (p. 15). The court below did not so read the record. *The petitioner does not so read it.*

United States v. Downer, 135 Fed. (2d) 521 (C. C. A. 2, 1943). I am in accord with all that the Second Circuit there says and holds” (R. 56). (The decisions of the Second Circuit Court referred to are *United States v. Kauten*, 133 F. (2d) 703 (C. C. A. 2, 1943); *United States v. Downer*, 135 F. (2d) 521 (1943), and *United States v. Badt*, 141 F. (2d) 845 (C. C. A. 2, 1944). Cf. also *United States v. Badt*, 152 F. (2d) 627 (C. C. A. 2, 1945), certiorari dismissed on motion of Solicitor General, 66 S. Ct. 979, 90 L. Ed. 912).

² The Selective Training and Service Act covers a large portion of the inhabitants of the United States.

THE SHOWING BEFORE THE SELECTIVE SERVICE AGENCIES BY THE PETITIONER WAS TO THE EFFECT THAT HE WAS A CONSCIENTIOUS OBJECTOR, AS WELL AS A POLITICAL OBJECTOR, TO ALL WARS. HAD THE ADMINISTRATIVE AGENCIES FOLLOWED THE INTERPRETATION OF "RELIGIOUS TRAINING AND BELIEF" GIVEN BY THE SECOND CIRCUIT THE PETITIONER WAS ENTITLED TO A CLASSIFICATION AS A CONSCIENTIOUS OBJECTOR UNDER THE ACT.

It is true, as urged by the Government, that the hearing officers in the Selective Service System found that the petitioner was a political objector to war; it is further true that the petitioner was a political socialist. Neither is necessarily inconsistent with a finding that he is *also* a *religious* pacifist.³

A close reading of the record, and an intelligent analysis of the statements of the two hearing officers, disclose that *solely* because of the petitioner's lack of belief in a supernatural god was he denied the exemption claimed.⁴ Thus the first hearing officer, C. H. Hartke (Supp. Rec. 16-29), recommended the rejection of the petitioner's claim, because of a lack of showing that the petitioner in his activities had made an effort "to carry out the wishes of a divine providence." (Supp. Rec. 28.)

And the second hearing officer, J. R. Files (Supp. Rec. 29-34), seems to have taken essentially the same view when he concluded that "None of the deep-seated beliefs of Registrant as they were related at the hearing had any

³ Norman Thomas, author of "Is Conscience a Crime", friend, if not mentor, of the petitioner (R. 57), is clearly such a person. Judge Denman below called Thomas a "Presbyterian and long a clergyman in churches of that faith." Another outstanding example is Bishop Parsons of the Episcopal Church at San Francisco; he is a political socialist as well as a religious leader; and both a political and religious pacifist.

⁴ Hence the Selective Service agencies, as did the court below, erroneously construed and applied the phrase "religious training and belief" in the Act.

relation to worship, none comport with the generally accepted meaning of religious belief." (Supp. Rec. 32.)

For, except for the 16th century notion, accepted by the hearing officers, that "divine providence"⁵ is an indispensable element of religion, the findings of these very hearing officers are to the effect that the petitioner was essentially religious in his opposition to war, despite their formal conclusions that the petitioner should not be classified as a conscientious objector.

Thus, Hearing Officer C. H. Hartke stated "when asked of what his religion consisted he stated in substance that his principal religious belief was that of doing all the good he can for people in need, and to do everything he could to help his fellow-man—to do by others as he would be done by,' in other words, 'The Golden Rule'; to enter into all cooperative movements and efforts to help his fellow man to develop a democratic and socialistic form of life; that he had for the last few years and expected in the future to devote himself to this work, selling and distributing pamphlets and peace literature as mentioned above." (Supp. Rec. 23.) At another point Mr. Hartke states: "That the petitioner contended that socialism was his religion." Quoting the petitioner "My Socialist views are my religious views," he observes, "these views are not based upon any particular teaching of the Bible, but only that of the Golden Rule. He has lectured and debated this theory upon every opportunity and sent letters to the newspapers long before Pearl Harbor." (Supp. Rec. 24.)

And in his conclusions, the officer finds that: "Since he states socialism and his practice thereof constitutes his primary religion, then he could hardly be deemed more than a *religious pacifist* if such a religion rather than a

⁵ The court below thus put it: "that philosophy and morals and social policy without the concept of deity cannot be said to be religion" (R. 46).

conscientious objector by reason of religious training and belief." (Supp. Rec. 29.) *'Italics ours.'*)

In short, Officer Hartke, in effect, thus concedes that the petitioner is a religious pacifist as distinguished from a political pacifist; but concludes that the petitioner was not entitled to a classification as a conscientious objector, because as the hearing officer viewed it, the petitioner was not carrying out the "wishes of a divine providence." (Supp. Rec. 28.)

Again, the second hearing officer, J. R. Files, notes that "He (the petitioner) says that socialism is his primary religion, and without doubt that is true." (Supp. Rec. 34.)⁶ Moreover, the overwhelming and unchallenged evidence before the Selective Service agencies (all before this court in the Record, Supplemental Record, and exhibits) disclosed that the petitioner is a religious objector (except only his non-belief in a supernatural or personal god). All of the judges of the Circuit Court below so read the record.

Officer Hartke thus reviewed some of the evidence before him:

"(b) A letter by Ernest Caldecott, Minister of the First Unitarian Church;

"(c) A letter by Reverend Allan A. Hunter, of the Hollywood Congregational Church. Each of these ministers indicate their confidence in registrant's sincerity.

"(d) Mrs. John Beardsley also vouches for registrant's sincerity as does Irving Dolin, and states as do some of the others that registrant expressed himself in this regard before the declaration of war.

⁶ Although stating that certain pamphlets distributed by the petitioner disclosed "vigorous and crusading opposition . . . to this war" (Supp. Rec. 32), Mr. Files found that the petitioner "is against war in any form" (Supp. Rec. 31); the Circuit Court below agreed that he was opposed to all war (R. 39).

“(e) Harold Slocum, Associate Minister of the Hollywood Congregational Church, is of the same tenor; in addition, he states that ‘these convictions are fundamentally based on religious beliefs, even though he is not attached to our particular Church’ . . .

“(f) Edwin P. Ryland, Minister, vouches for registrant’s sincerity but does not add anything else to the situation.

“(g) A letter from Norman Thomas, dated October 19, 1942 states: ‘I have never discussed specifically with him his position on war, but I have known of his deep sincerity. He holds his convictions with religious fervor and he tries to make his conduct conform to his convictions. It is to this quality of sincerity that I am bearing witness.’

“Registrant states that in connection with his work as a member of these various organizations and on his own (fol. 25) accord, independently thereof, he has spent much time in doing what he could to alleviate the suffering of the poor and distressed, soliciting clothing, wearing apparel, shoes, suits, etc., for the poor laborers and farmers, shipping it to them; gathering books and various necessities which could be used by share-croppers and people unfortunate financially and in need of various necessities; stating that he has not only personally gone from door to door but appealed for gifts of this sort from various sources, accumulating it and gathering this material in whatever means he could personally, thereafter distributing same among the needy at his own expense.” (Supp. Rec. 22-23.)

Mr. Hartke accepted as true the petitioner’s statement: “Therefore, for the sake of humanity and out of deep loyalty to my fellow citizens I am opposed to war and refuse to participate in any activity connected with the war effort” (Supp. Rec. 16), accompanying the petitioner’s conscientious objector’s form (Supp. Rec. 20); and that

the petitioner was "engaged in an energetic crusade and work" and that this work was not only "political" but was also "humanitarian"⁷ (Supp. Rec. 18).

From the showing before him, Hearing Officer Files concluded that the petitioner "has plenty of courage; he is, and long before Pearl Harbor was, willing to espouse his opposition to war whether the case was popular or unpopular, whether practical or impractical. If he stood alone he would oppose this war and would fight our participation in it as zealously—even with equal futility—as King Canute, who tried to turn back the tides; all of this I believe regarding the conduct and the character of Registrant" (Supp. Rec. 33).⁸

⁷ Cf. the findings of the Hearing Officer in *United States ex rel. Beil v. Badt*, 141 F. (2d) 845 (C. C. A. 2, 1944) that: "Even though he (the petitioner) be a sincere philosophic humanitarian, which may be regarded as a sociological concept of the highest order, nevertheless his conviction does not come within either the terms or the intent of the statute" (at p. 847). Nonetheless, the Second Circuit rejected the Hearing Officer's views as being too narrow a construction of the phrase "religious training and belief."

⁸ The petitioner's Selective Service file discloses a letter in it, dated January 15, 1944, from professor Walter C. Muelder, then Professor of Christian Theology and Christian Ethics at the University of Southern California, Graduate School of Religion, which thus speaks of the petitioner:

"Mr. Berman is a Socialist, and like many Socialists is unalterably opposed to war and to methods of violence. He has a deep sense of reverence for life and for the sacredness of personality. Like most socialists that refuse to participate in so-called 'capitalistic' wars, he affirms that the dominant economic system inevitably fosters war along with its ruthless competition, exploitation of persons, class conflict, and imperialism. *His reaction is not simply one of political or economic displeasure, but a total spiritual protest against the war system and all its causes along with a wholehearted commitment to a society which shall be thoroughly democratic. There is no doubt in my mind that Socialism is a way of life for Mr. Berman and is pursued with no ulterior motives*" (Supp. Rec. 41). (Italics supplied.)

Further views of Professor Muelder are set forth in Appendix D to the Petition for the Writ of Certiorari herein. [They may be of interest to this court.]

Clearly, therefore, while falling short of the narrow definition of "religious training and belief" applied by the Selective Service agencies, and approved by the Circuit Court below, the petitioner does come within the broad definition of that phrase given by the Second Circuit.

For the record before the Selective Service agencies discloses that the evidence submitted by the petitioner before such agencies is to the unqualified effect that the petitioner showed, both in belief and in act, a deep and compelling "inner mentor", which, according to the Second Circuit, is the equivalent of a "religious impulse", and constitutes "religious training and belief" (*Kauten v. United States*, 133 Fed. (2d) 703, 708 (C. C. A. 2, 1943).⁹

Accordingly, this court should grant certiorari to resolve the conflict in the decisions between the Second and Ninth Circuit Courts of Appeals.

Respectfully submitted,

A. L. WIRIN,
257 South Spring Street,
Los Angeles 12 California,
Attorney for Petitioner.

⁹ Moreover, the rejection of the petitioner's claim to be classified as a conscientious objector is in direct conflict with the standard and definition of "religious training and belief" established by the Selective Service System itself. (See Petition for Writ of Certiorari, p. 12; see also brief of American Civil Liberties Union, amicus curiae, herein, at p. 8.)

INDEX

| | Page |
|--------------------------------------|------|
| Opinions below..... | 1 |
| Jurisdiction..... | 1 |
| Question presented..... | 2 |
| Statute and regulation involved..... | 2 |
| Statement..... | 3 |
| Argument..... | 11 |
| Conclusion..... | 21 |

CITATIONS

Cases:

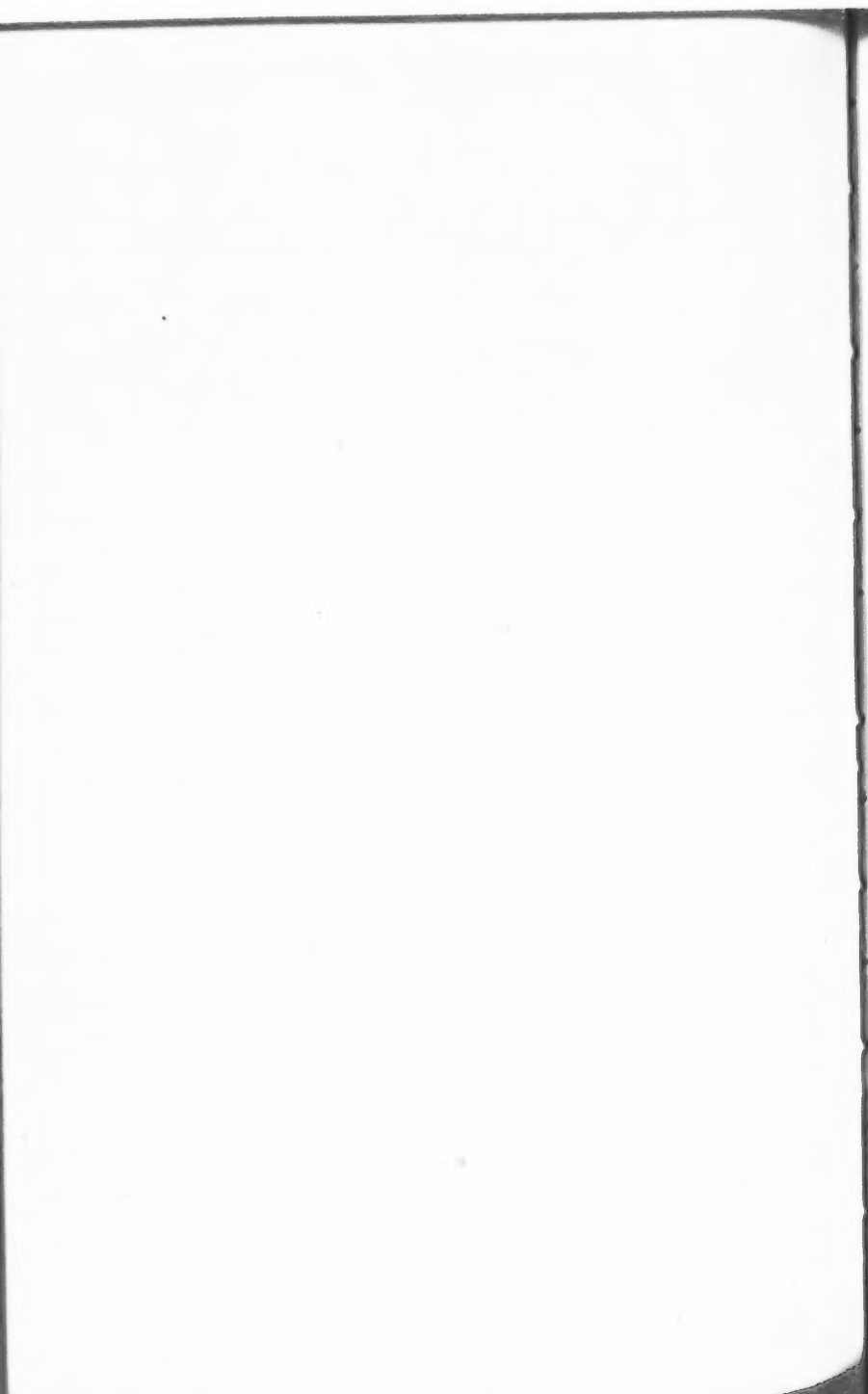
| | |
|--|------------|
| <i>Johnson v. United States</i> , 318 U. S. 189..... | 20 |
| <i>United States v. Badt</i> , 141 F. 2d 845..... | 12 |
| <i>United States v. Badt</i> , 152 F. 2d 627..... | 12 |
| <i>United States v. Dower</i> , 135 F. 2d 521..... | 12 |
| <i>United States v. Kauten</i> , 133 F. 2d 703..... | 12, 13, 15 |

Statute and regulation:

| | |
|---|-------|
| Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 301 <i>et seq.</i>): | |
| Section 5..... | 2, 12 |
| Section 11..... | 3, 20 |
| Selective Service Regulations, Section 622.51..... | 3 |

Miscellaneous:

| | |
|---|----|
| Federal Rules of Criminal Procedure, Rule 35..... | 20 |
|---|----|



In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 538

HERMAN BERMAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 36-50; see also R. 56-57¹) and dissenting R. 50-56) opinions in the circuit court of appeals are reported at 156 F. 2d 377.

JURISDICTION

The judgment of the circuit court of appeals was entered June 29, 1946 (R. 59), and a petition for rehearing (R. 61-66) was denied August 27, 1946 (R. 69). The petition for a writ of cer-

¹The record is in two volumes labeled "Transcript of Record" and "Supplemental Transcript of Record." We shall refer to the former as "R." and to the latter as "S. R."

tiorari was filed September 25, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether a selective service registrant whose opposition to war is not founded upon a sense of responsibility to divine authority and who disclaims affiliation with any religious sect or organization, but who is found to be a political objector to war, is entitled to exemption from military service as a person who, "by reason of religious training and belief," is conscientiously opposed to participation in combatant and noncombatant military service.

STATUTE AND REGULATION INVOLVED

Section 5 of the Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 305 (g)) provides, in part, as follows:

(g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is

inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. * * *

Section 622.51 of the Selective Service Regulations provides in pertinent part:

(a) In Class IV-E shall be placed every registrant who would have been classified in Class 1-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service.

STATEMENT

On November 22, 1944, petitioner was indicted (R. 2-3) in the District Court of the United States for the Southern District of California in one count charging that on October 18, 1944, he wilfully refused to submit to induction into the armed forces, in violation of Section 11 of the Selective Training and Service Act of 1940. At petitioner's trial before the court, a jury having been waived (R. 4-5), it was stipulated that he reported to the induction station on October 18 and that he refused to submit to induction (R. 16). Petitioner's counsel informed the court that petitioner's sole defense was that the classifying

boards had misconstrued the provision of Section 5 (g) of the act exempting conscientious objectors from military service as meaning that a registrant who does not believe in a deity and who is not connected with an organized religion is not entitled to its benefits. Counsel further stated that petitioner did not contend that the boards acted arbitrarily in classifying him; that his defense involved "purely a question as to the meaning of the law." (R. 17-18.) In support of this defense, petitioner's selective service file was admitted in evidence (R. 21), and the court heard testimony from petitioner concerning the nature of his beliefs (R. 19-22) and from the chairman of petitioner's board of appeal concerning the proceedings before the board when petitioner was finally classified (R. 22-26). Petitioner was convicted and sentenced to imprisonment for a term of three and one-half years (R. 6-7).

Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment was affirmed by the court sitting *en banc*, Judge Denman dissenting (R. 36-58, 59).

The pertinent information revealed by petitioner's selective service file may be summarized as follows:

On February 14, 1942, petitioner registered with local Board No. 228 in Los Angeles, California (R. 15), and on June 6, 1942, he filed his questionnaire (S. R. 1-9). In that document petitioner

stated, *inter alia*, that he was 21 years old (S. R. 2); that he was employed as a shipping clerk (S. R. 2); and that he desired classification in class IV as one exempt from military service (S. R. 7). At the same time petitioner filed the "Special Form for Conscientious Objectors" (S. R. 10-13), in which he stated that he was opposed to combatant and noncombatant military service. He described his beliefs as follows (S. R. 10):

Democracy cannot be served by going to war. The way to serve democracy is to cultivate and extend it—to make it work—where even only a semblance of it exists. Through abolition of restrictions on our democracy, political and economic (poll taxes, etc.), not only would democracy be served, but society as a whole would be benefited. This would be preliminary to a social order based on the mutual understanding of human needs, and hence resulting in the cooperative commonwealth.

In describing the source of these beliefs, petitioner stated (S. R. 10):

In 1936, I began to realize the causes of—recurring wars and depressions. At that time, I resolved to learn more about it. Though the following books and publications convinced me, they did not advocate or ask anyone to become a conscientious objector. This I have done of my own accord, fully realizing the possible consequences. "As I See It"—by Norman

Thomas. "Other People's Money"—Louis Brandeis. "War Madness"—Stephen Raushenbush. "Is Conscience a Crime?"—Norman Thomas. "Walls and Bars"—Eugene V. Debs. "Merchants of Death"—Fortune Magazine, 1934. "Nye Committee Investigation of Munitions". "The Fellowship"—Publication of the Fellowship of Reconciliation. "The Call"—Socialist Party organ.

Petitioner expressly stated in the form that he is not a member of any religious sect or organization (S. R. 12), and in answer to the question asking the name of the "individual upon whom you rely most for religious guidance," petitioner stated, "I rely on no one for religious guidance" (S. R. 11). In response to a question concerning his organizational activities, petitioner said (S. R. 12):

Young Peoples' Socialist League—joined in 1937. Have distributed literature and collected funds for victims of war and oppression. Youth Committee Against War—joined in 1939. Was L. A. secretary. Workers Defense League—joined in 1940. Collected funds and clothing to help victims of poverty among sharecroppers and tenant farmers. Also helped to collect funds to defend politically oppressed in the United States. Socialist Party, joined in 1940. Helped in struggle to keep America out of war, and to create a better and more desirable society. Hollywood Consumers' Cooperative Association—helped build a people's

business, a movement to take profit out of business.

In a supplement to the conscientious objector form, petitioner described the purposes and activities of the various organizations with which he was connected (S. R. 15). At the same time, he submitted a supplemental statement "to explain my conscientious objection to war" (S. R. 15-16), in which he said:

American boys are dying and killing on battlefronts on every continent; on all the seas and in the air—throughout the world—supposedly to preserve the freedom we have known in the United States.

As I thought and publicly stated for several years, I continue to affirm that the present war is a continuation of conditions prevailing before the last war and following the Treaty of Versailles, and is an integral part of the social system and economic system under which we live.

Some of the other factors involved in this whole vicious cycle are exploitation, poverty, unemployment, vice, crime, disease (pellagra—prevalent in many of our potentially wealthiest areas), scarcity amidst potential abundance, totalitarianism, (Hitlerism, Stalinism, Mussolinism, Hirohitism), etc.

Totalitarianism is directly traced back to those factors I mentioned above. To do away with it is to do away with the others.

* * * These social injustices are increased in time of war, and become more

difficult to eradicate in each succeeding war. This is to cite but a few of the injustices in America.

Therefore, for the sake of humanity, and out of deep loyalty to my fellow citizens I am opposed to war and refuse to participate in any activity connected with the war effort. * * *

On July 28, 1942, the local board unanimously classified petitioner I-A, and he thereupon appealed to his board of appeal (S. R. 8). The board of appeal referred the case to Department of Justice Hearing Officer C. H. Hartke, who conducted a hearing on petitioner's claim to exemption as a conscientious objector. Petitioner appeared at the hearing, together with seven witnesses, who furnished information on his behalf. In addition, the Hearing Officer had before him a report of an extensive investigation of petitioner conducted by the F. B. I. A summary of the evidence adduced at the hearing is contained in the Hearing Officer's report (S. R. 16-29). On the basis of the evidence adduced at the hearing, together with the information contained in petitioner's selective service file, the Hearing Officer recommended that petitioner be classified in I-A, and in support of the recommendation he detailed his conclusions as follows (S. R. 28-29):

* * * it is impossible for the Hearing Officer to believe that the registrant "by reason of *religious training and belief*" is conscientiously opposed to participation

in war in any form. It is believed that registrant is sincere insofar as his belief and desire to promote the socialist party and its various kindred organizations are concerned. Undoubtedly he feels that he is justified in taking this very definite positive stand against the present situation of our government and advocating a new order, and placing into effect and carrying out a socialistic principle and form of government. His whole thesis, his entire argument and discussion is based thereon and no doubt he is doing a great good in his effort to help the needy and to promote their welfare and better conditions for them. However, having in mind the provisions of the Act and the decision of the United States Circuit Court of Appeals for the Second District, in the case of the *United States of America v. Mathias Kauten*, appellant, (1943) and the statement of the Court therein, it is impossible for this Hearing Officer to conclude that the registrant is entitled to deferment by reason of any opposition to war by reasons of "religious training and belief." As stated by the Court therein "the conviction that war is a futile means of righting wrongs or of protecting the state, that it is not worth the sacrifice, that it is waged for base ends, or is otherwise indefensible is not necessarily a ground of opposition based on 'religious training and belief'." Even though the registrant may be utterly sincere for other reasons, in his opposition to

military service, undoubtedly as was the situation in the case cited, the registrant in this instance objects to war largely by reason of his philosophical and political views.

Registrant's vehement advocacy of socialism and his socialistic ideas as to our present form of Government, especially insofar as same is responsible for present war situation, together with his record of activity along this line of thought, the preparation and distribution of literature in support thereof together with his oft repeated declarations, seem to indicate rather clearly that registrant is definitely a political pacifist. Since he states socialism and his practice thereof constitutes his primary religion, then he could hardly be deemed more than a religious Pacifist if such be a religion rather than a conscientious objector by reason of religious training and belief.

On May 26, 1943, the board of appeal classified petitioner I-A (S. R. 8). Petitioner's classification was thereafter reopened, and on February 1, 1944, the local board determined that the I-A classification was proper (S. R. 8). Petitioner again appealed to the board of appeal and that board referred the case to Department of Justice Hearing Officer J. R. Files for a second hearing on petitioner's claim to classification as a conscientious objector. On August 10, 1944, petitioner, accompanied by his attorney and witnesses,

appeared before the Hearing Officer, and the facts upon which he predicated his claim to exemption were again set forth (see S. R. 29-34). The Hearing Officer recommended against petitioner's claim to exemption, stating the reasons for this conclusion as follows (S. R. 31-34):

There can be no doubt that one without membership in any orthodox church might be profoundly moved by conscience; it is no doubt true that one without membership in any church might be conscientiously opposed to war as a result of "religious training and belief." In this case it is hardly a question of what might be; it is a question of what the clear, overwhelming, and unmistakable evidence points to as the motivation of Registrant in his determined opposition to participation in war in any manner whatsoever. That he is against war in any form, there can be no doubt; that he is sincere in the belief that war is sheer futility, I heartily agree; that he is determined that he shall have not part in this war, the record clearly sustains; but that Registrant is opposed to war as a result of any religious training or belief, I do not find a shred of evidence to support. It may well be that Registrant is conscientious in his complete belief in socialism; he may have been conscientious in his appeal to communists to join in a vigorous opposition to war, capitalism, and government policy with which he had no sympathy; but as I conceive it, that is not the essence

of conscientious objection to war based upon religious training and belief. I find no evidence whatsoever that Registrant's objection to war stems from any other source than social and political concepts.

* * * * *

I believe that Registrant is sincere in his effort to promote the Socialist Party, in his belief that war is futile, and in his diagnosis of this war as a war for the benefit of capitalists. He has plenty of courage; he is, and long before Pearl Harbor was willing to espouse his opposition to war whether the case was popular or unpopular, whether practical or impractical. If he stood alone he would oppose this war and would fight our participation in it as zealously—even with equal futility—as King Canute, who tried to turn back the tides; all of this I believe regarding the conduct and the character of Registrant. I do not believe that there is an ounce of conscientious objection to military service as referred to in the Selective Service Act. I regard much of the reasoning in support of his position as pure sophistry, regardless of the sincerity with which he attempts to make his case. He is as much opposed to our form of government as he is to the participation in war by this nation. If he is conscientiously opposed to one by reason of "religious training and belief," he is equally opposed to the other on the same ground. He says that socialism is his pri-

mary religion, and without doubt that is true.

This Hearing Officer finds and Recommends that Registrant should be classified in Class I-A and that his claim as a conscientious objector should be denied.

The board of appeal classified petitioner I-A, and on September 15, 1944, he was notified of this action (S. R. 9). As we have shown above, he was thereafter ordered to report for induction, and after having reported he refused to submit to induction.

ARGUMENT

1. Petitioner conceded (S. R. 11, 12) that he is not affiliated with any religious sect or organization and that he relies on no one for religious training or guidance, and there is no claim that his opposition to military service stems from his responsibility to divine authority. Nevertheless, he contends that he is a conscientious objector to military service "by reason of religious training and belief" within the meaning of Section 5 (g) of the Act. The court below, in rejecting this contention, held that "the expression 'by reason of religious training and belief' is plain language, and was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one" (R. 44). This con-

clusion, the court noted, involves views which are "divergent" from those expressed by the Circuit Court of Appeals for the Second Circuit in *United States v. Kauten*, 133 F. 2d 703; *United States v. Downer*, 135 F. 2d 521; and *United States v. Badt*, 141 F. 2d 845.² The Second Circuit has broadly construed the statutory language in question as including anyone who by reason of a compelling voice of conscience is opposed to war in any form, even though the source of the objection is not grounded in a belief in an authority characterized by the court below as "higher and beyond any worldly one."

We concede, of course, that there is a conflict in principle between the Ninth Circuit's interpretation of the conscientious objector's exemption and the broad construction which the Second Circuit has given that provision. It is equally clear, however, that on the facts of this case there

² In the *Kauten* case the court concluded that the defendant was properly denied exemption from military service because he was an atheist or agnostic whose sincere opposition to war was based on philosophical and political convictions. In *United States v. Downer*, the court held that a sincere opposition to war based on humanitarian considerations entitled the registrant to exemption from military service. In *United States v. Badt*, the court held that if the registrant's claim to exemption was denied because his opposition to war was based only on humanitarian considerations, the classification was illegal. It was determined thereafter that the registrant had been denied exemption by the Director of Selective Service because the Director found that he was not sincere in his beliefs. See *United States v. Badt*, 152 F. 2d 627.

is no conflict between those two circuits and that the administrative decision was grounded upon an interpretation of the statute which was entirely consistent with the decision of the Second Circuit upon which petitioner relies. As we shall show, petitioner was denied classification in IV-E, not because he felt no responsibility to a deity, but because the triers of the facts found that he was a political objector to war, not a conscientious objector. Since even the Circuit Court of Appeals for the Second Circuit recognizes that a political objector to war is not entitled to exemption from military service,³ there is, we submit, no need to reach the question which the court below decided, i. e., whether an objector to war whose objections do not stem from a sense of responsibility to divine authority is exempt from service.

At petitioner's trial the chairman of the board of appeal was called as a witness for the defendant. He testified (R. 25) that "in this particular case the Board followed the recommendation of the hearing officer in the Department of Justice." As we have shown in the Statement, *supra*, pp. 8-11, the first Hearing Officer to pass on petitioner's case had before him the decision of the Second Circuit in the *Kauten* case, *supra*, and he was

³ In the *Kauten* decision, *supra*, at p. 707, the Court said:
 " * * * the conviction that war is a futile means of righting wrongs or of protecting the state, that it is not worth the sacrifice, that it is waged for base ends, or is otherwise indefensible is not necessarily a ground of opposition based on 'religious training and belief.' "

aware of the distinction that court drew between a conscientious objector and a political objector to war. Quoting from the Second Circuit's description of convictions which were not necessarily based upon "religious training and belief" (see note 2, *supra*), the Hearing Officer concluded that petitioner objects to war "largely by reason of his philosophical and political views"; that petitioner's "vehement advocacy of socialism" and his various activities "seem to indicate rather clearly that registrant is definitely a political pacifist," not a conscientious objector (S. R. 28-29). Approximately a year later a second hearing was had before another Hearing Officer. This officer stated his view that "one without membership in any church might be conscientiously opposed to war as a result of 'religious training and belief'" (S. R. 31). But he recommended against petitioner's claim because the "clear, overwhelming, and unmistakable evidence" showed that petitioner's objection to war stemmed from his social and political concepts. Thus, the second Hearing Officer's report states (S. R. 32).

A perusal of the numerous pamphlets and circulars, of a number of which Registrant says he was the author, indicates that the vigorous and crusading opposition in which Registrant participated so fervently was directed to *this war*. Circular numbered 1 refers to our one-man government bringing about conscription, rationing, and

controlled economy. Pamphlet numbered 2 refers to the unholy alliance between Stalin and Hitler, the viciousness of the Versailles Treaty, and the over-reaching of Chamberlain and Daladier. Pamphlet numbered 6 refers to the coalition between American financiers and the government of Great Britain; the design of American government to solve Europe's problems; the Stalinist bureaucracy in Russia, which is called "pro-Hitlerism"; rejection of an international police force concept; and opposition to all mobilization plans. Pamphlet numbered 7 refers to American youth being "caught on the barbed wire of European battle fields." Resolution numbered 8 refers to the sufficiency of our navy, since it is "Bigger than Great Britain's and larger than the combined navies of the next three to Great Britain's"; quotes from military authorities that "our present armament is more than adequate."

To attribute a religious aspect to an intense devotion to socialism could no more come within the principles enunciated in our Selective Service Act than to attribute a religious aspect to an apoplectic belief that the re-election of President Roosevelt will stop the wheels of progress and forever put out the lights on free enterprise.

In short, it is plain from the reports of the Hearing Officers that they were applying the construction of Section 5 (g) which previously had

been adopted by the Second Circuit, and that they recommended against petitioner's claim, not because he was not affiliated with a religious sect and did not believe in a deity, but because they both concluded that conscience was not the source of his objection to military service, and that his objection to military service rested on political considerations. The board of appeal which finally classified petitioner I-A adopted the recommendation of the Hearing Officers (R. 25), and at his trial petitioner specifically disclaimed that he was attacking his classification on the ground that the board acted arbitrarily in rejecting his claim to exemption (R. 17-18). In these circumstances, we think it is unnecessary to review the conclusions expressed by the court below as to the proper interpretation of the statutory exemption of conscientious objectors. Since even under the doctrine of the Second Circuit invoked by petitioner, he is not entitled to exemption from military service, the question of interpretation concerning which the Second and Ninth Circuits have expressed divergent views need not be reached in this case. For even if it were reached and if this Court adopted the view of the Second Circuit, petitioner, as a political objector to military service, still would not be entitled to classification in IV-E.

2. Petitioner suggests, but does not argue (Pet. 30), that he should be given a new trial because

"the Trial Judge did not review the evidence submitted to the Selective Service Agencies." However, his position in the trial court was that no such issue was tendered. His counsel stated to the trial judge that the case "proposed two questions of law" (R. 17): (1) whether a registrant who refused to submit to induction is in a position to challenge the induction order in the criminal trial (R. 18), and (2) if so, "that the defendant contends not that he was arbitrarily classified, but that the Selective Service Agency misinterpreted the law, misconstrued the phrase 'religious belief' and denied him the classification as a conscientious objector because of an erroneous view which the Selective Service Agency had as to the meaning of 'religious training and belief' " (R. 17). At another point in the trial, petitioner's counsel stated to the court (R. 18):

Again I want to make myself clear
 * * * this does not involve a question
 of an arbitrary classification; doesn't involve a reappraisal by this Court, * * *
 of facts presented before the Selective Service agency; * * *

Examination of petitioner's briefs in the circuit court of appeals reveals that the contention now urged by petitioner was argued for the first time in a supplemental brief filed after the oral argument of the case.

Plainly, the trial judge could not have erred in failing to inquire whether there was any foundation in fact for petitioner's classification. For in the clearest language possible, petitioner stated and restated in the trial court that he was not defending on this basis; that his sole defense was predicated on his claim that the statutory exemption had been misconstrued. In view of this disclaimer in the trial court, there is no basis for petitioner's belated contention in this Court. Cf. *Johnson v. United States*, 318 U. S. 189, 199-201.

3. Petitioner also urges (Pet. 30-32) that the three and one-half year sentence imposed upon him is so excessive that this Court should remand the case for resentencing. This contention obviously presents nothing for review by this Court, for the sentence is well within the five-year maximum fixed by Congress in Section 11 of the Selective Training and Service Act. It should be noted also in this connection that petitioner is not without recourse. Rule 35 of the Federal Rules of Criminal Procedure permits him to apply to the district court for a reduction of sentence and that court may, if a sound judicial discretion warrants it, reduce the sentence "within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

✓ GEORGE T. WASHINGTON,
Acting Solicitor General.

✓ THERON L. CAUDLE,
Assistant Attorney General.

✓ ROBERT S. ERDAHL,
✓ IRVING S. SHAPIRO,
Attorneys.

NOVEMBER 1946.

OCT 10 1946

CHARLES ELMOKE GROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 1946

No. **538** 1

HERMAN BERMAN,
Petitioner,
against

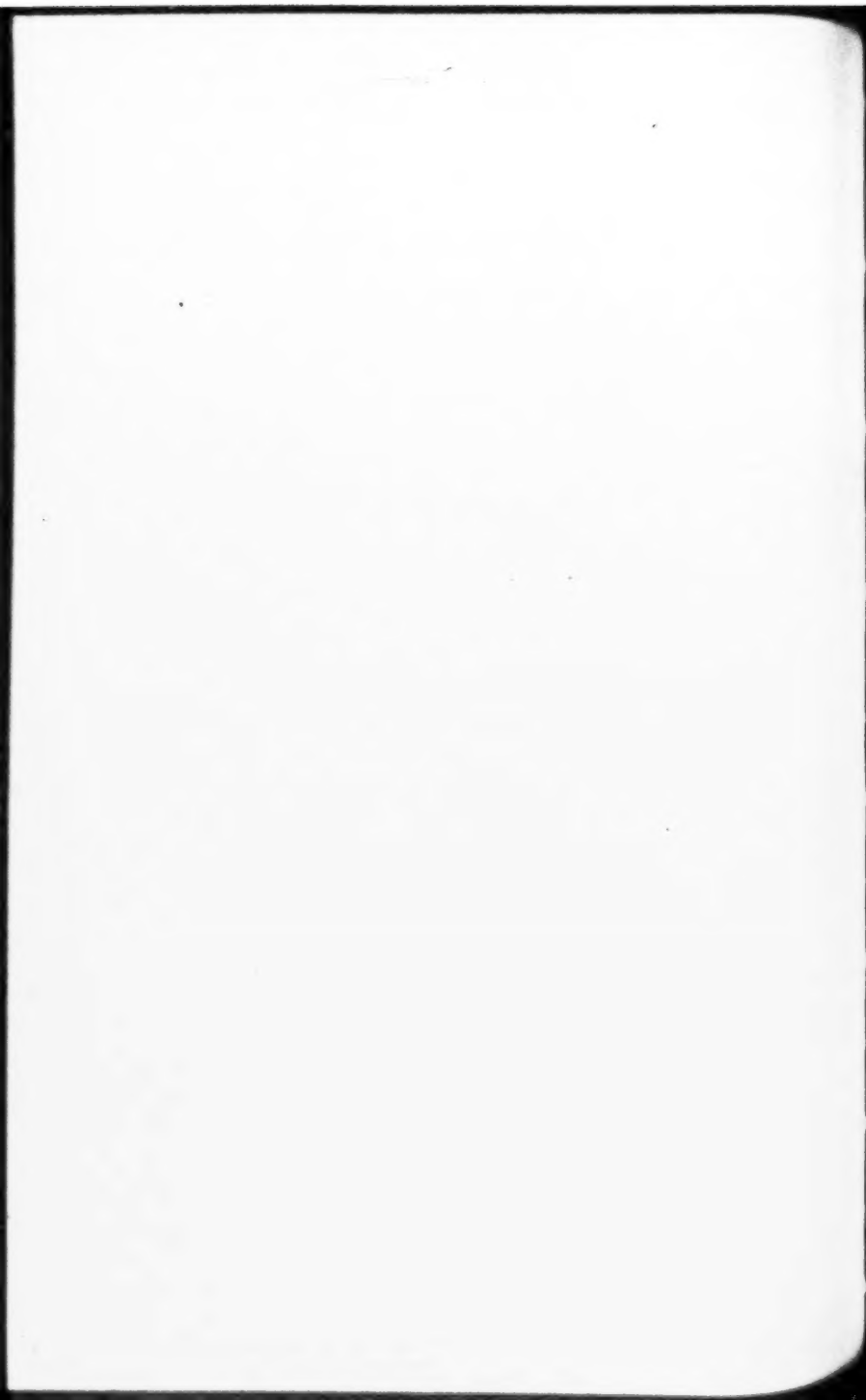
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION, AMICUS CURIAE**

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
JULIEN CORNELL,
15 William Street,
New York 5, N. Y.,
Counsel.

ERNEST ANGELL, ✓
OSMOND K. FRAENKEL, ✓
Of the New York Bar,
of Counsel.



INDEX

| | PAGE |
|---|------|
| STATEMENT | 1 |
| THE FACTS | 2 |
| REASONS FOR ALLOWANCE OF WRIT | 6 |
| I—Conflict between the decision below and decisions of the Circuit Court of Appeals for the Second Circuit | 6 |
| II—Conflict in decisions and policies of Selective Service Agencies | 8 |
| III—The court below has erroneously construed the exemption for conscientious objectors in the Selective Training and Service Act | 11 |
| IV—It is respectfully submitted that the petition for a writ of certiorari should be granted..... | 14 |

Table of Cases Cited

| | |
|--|-------------------------|
| U. S. v. Kauten, 103 Fed. 2d 703..... | 2, 6, 7, 10, 11, 12, 13 |
| U. S. ex rel. Phillips v. Downer, 135 Fed. 2d 521..... | 2, 8, 11 |
| U. S. ex rel. Reel v. Badt, 141 Fed. 2d 845..... | 2, 8 |

Statute and Regulations Cited

| | |
|--|----------|
| Selective Training and Service Act of 1940, Section 5(g) (50 U.S.C. App. §305g) | 1, 6, 12 |
| Selective Service Regulations: | |
| Sec. 627.5 | 11 |
| Sec. 627.25(b) | 3 |
| Sec. 628.1-628-7 | 11 |
| Executive Order 8619, 5 Fed. Reg. 5256 | 10, 11 |

Other Authorities Cited

| | |
|--|-------|
| Selective Service in Wartime, p. 258 | 8, 10 |
| The Conscientious Objector, published by National Service Board for Religious Objectors | 9 |



IN THE
Supreme Court of the United States

OCTOBER TERM 1946

No.

HERMAN BERMAN,
Petitioner,
against

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE

Statement

In the petition for writ of certiorari this court is asked for the first time to review and settle a question which has been much vexed in lower Federal courts and administrative agencies operating under the Selective Training and Service Act of 1940, namely, the construction of the phrase contained in Section 5(g) of that Act (50 U. S. C. App. §305g) which limits exemption from military service to those who are conscientious objectors "by reason of religious training and belief".

The construction adopted by the court below is squarely in conflict with the previous construction followed in the

Second Circuit in *U. S. v. Kauten*, 103 Fed. 2d 703; *U. S. ex rel. Phillips v. Downer*, 135 Fed. 2d 521; and *U. S. ex rel. Reel v. Badt*, 141 Fed. 2d 845. Furthermore, the ambiguity of the statute has puzzled draft boards and hearing officers of the Department of Justice who have been charged with classifying conscientious objectors and has resulted in conflicting rulings and policies. Review by this court is sought not only because of the need for authoritative construction of an ambiguous statute and the conflict in decisions of courts and administrative agencies, but also because many conscientious objectors, like the petitioner here, whose scruples are sincerely held, have been denied exemption and imprisoned solely because their conscientious beliefs in regard to war did not relate to any formal concept of deity.

Since the civil rights of petitioner and many others similarly situated are involved, the American Civil Liberties Union is impelled to file this brief urging review.

The Facts

The petitioner, Herman Berman, registered under the Selective Training and Service Act of 1940 and filed a questionnaire on June 6, 1942, with his local draft board in Los Angeles, California (S. R.)*. On the questionnaire he stated in answer to the question under "Series X" that he is conscientiously opposed both to combatant and non-combatant military service by reason of religious training and belief (S. R.). On the same day the petitioner filed a special form for conscientious objectors (Form 47) in which he gave a detailed statement of his

* (References S. R. are used to designate the supplemental record. Since this has not yet been printed page references cannot be given. References to the original record, with page references, are indicated by the letter R.)

views (S. R.). This statement was amplified at a hearing held on March 12, 1943, before Hon. Christian H. Hartke, Special Assistant Attorney General, designated to hear claims of conscientious objection and make recommendations to the Department of Justice under the procedure set up under Sec. 627.25(b) of the Selective Service Regulations.

Petitioner's objection to war was based upon sincere conscientious scruples. The draft boards, the Department of Justice and the courts below were unanimous on this point. Exemption as a conscientious objector was denied him however because it is claimed, as stated in the opinion of the Circuit Court of Appeals: "No matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion" (R. 46).

In determining whether petitioner's views are "religious" within the meaning of the statute, it is necessary to examine them in some detail as set forth in the Supplemental Record. At the time of filing his questionnaire the petitioner had just passed the twenty-first anniversary of his birth, which was in 1921. He was educated in a Brooklyn, New York, high school where he became interested in activities in behalf of peace, and also in support of the rights of labor. These activities and interests continued after graduation from high school and are reflected in his membership in the Youth Committee Against War, the Co-operative League, the Workers Defense League, the Socialist Party and other similar organizations. In fact the petitioner's chief occupation in recent years has been political and humanitarian work, particularly his work in behalf of peace. The petitioner

distributed a variety of literature of a pacifist and socialist nature in this connection.

Petitioner summarized his opposition to war in a statement to his draft board as follows: "For the sake of humanity and out of deep loyalty to my fellow citizens I am opposed to war and refuse to participate in any activity connected with the war effort. However, I seek to continue working in the fields of constructive effort, alleviating distress among the underprivileged members of society, assist in breaking down the barriers of race, color, and creed, and work towards a society based on social ownership and co-operative and genuinely democratic control of the means of production and distribution for the benefit of all mankind."

The petitioner stated that he belonged to no church, but was reared in a Jewish family by religious parents. He summarized his religious views in terms of the Golden Rule and said that he had spent much time in alleviating suffering of the poor and distressed, particularly farmers and sharecroppers, by distributing clothing, books and other necessities, which he solicited by personal appeals and door to door canvassing. He also stated that his social views, which he described as socialism, were his religious views.

Witnesses interviewed by the Federal Bureau of Investigation and others who testified before the hearing officer were unanimous in ascribing the petitioner's opposition to war to his passion for social justice, which some of the witnesses regarded as a religious belief. The sincerity of these views was never seriously questioned.

The local draft board which considered the statements filed with it rejected petitioner's claim of conscientious objection and classified him in Class 1A as available for

military service (S. R.). From this classification he appealed on January 25, 1943 and the appeal was referred to the hearing officer, Mr. Hartke, who received the further evidence mentioned above. The hearing officer determined that the petitioner's views were not religious in character and recommended that he be classified 1A (S. R.). This recommendation was concurred in by the Department of Justice, as shown in a letter dated May 7, 1943, addressed to the appeal board (S. R.). The chairman of the appeal board testified (R. 22-27) that his board had considered the report of the hearing officer and other evidence in the petitioner's draft file (now set forth in the Supplemental Record) and had before it no other evidence. The witness could not, however, recall the case, stating that many hundreds of such cases were before the board, and gave no indication of the basis upon which the appeal board's decision was made, other than stating that all the evidence in the file was considered.

The decision by the appeal board was the final administrative action in the case. The petitioner requested that a Presidential appeal be taken in his behalf by the Director of Selective Service (S. R.) but this request was denied and the decision of the appeal board was allowed to stand (S. R.). Subsequently the petitioner was ordered to report for induction on October 18, 1944 (R. 16). He went to the induction station and passed the physical examination but refused to take the oath of induction (R. 16). As stipulated on the trial, he complied with all orders and took all steps up to the point of taking the oath of induction (R. 16). For his refusal to submit to induction he was indicted, pleaded not guilty, and after a trial before a jury was convicted and sentenced to imprisonment for $3\frac{1}{2}$ years (R. 7).

The petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 8) on the grounds urged here as justifying review by this court.

Reasons for Allowance of Writ

The American Civil Liberties Union urges this court to grant the petition and allow the writ for the reasons set forth below:

I

Conflict between the decision below and decisions of the Circuit Court of Appeals for the Second Circuit.

The court below construed the requirement of "religious training and belief" for exemption of a conscientious objector (§5(g) Selective Training and Service Act of 1940, 50 U. S. C. App. 305(g)) as follows:

"It is our opinion that the expression 'by reason of religious training and belief' is plain language, and was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one." (R. 44)

"No matter how pure and admirable (the appellant's) standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion." (R. 46)

An exactly contrary construction was adopted in the Circuit Court of Appeals for the Second Circuit in *U. S. v. Kauten*, 133 Fed. 2d 703, 708, in which the court said:

"The provisions of the present statute * * * take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of exemption. * * * A compelling voice of conscience * * * we should regard as a religious impulse. * * *

It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellowmen and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.

* * * * *

There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."

The foregoing was not necessary to the decision in the *Kauten* case, but the court held to the same effect in *U. S.*

ex rel. Phillips v. Downer, 135 Fed. 2d 521 and *U. S. ex rel. Reel v. Badt*, 141 Fed. 2d 845. The decisions in the Ninth Circuit and in the Second Circuit are thus squarely in conflict, the former holding that a conscientious objector cannot be "religious" within the meaning of the statute unless he accepts the concept of a deity, while the latter holds that one may be religious without any formal belief in a god.

II

Conflict in decisions and policies of Selective Service agencies.

Even more important than the conflict between the decisions of the Second Circuit and the Ninth Circuit on this question is the similar conflict which prevails among draft boards and Selective Service officials. This conflict was commented upon by the Director of Selective Service in his second annual report, "Selective Service in War Time" (United States Government Printing Office 1943) where it is stated (p. 258):

"The appeals of conscientious objectors have presented some of the most troublesome as well as the most interesting questions. Here divergent ideas broke sharply over that rock of contention presented by the congressional language 'religious training and belief.' * * *

Hearing officers of the Department of Justice * * * held generally that the conviction, while limited to no particular creed, must nevertheless rest upon an easily recognizable religious background with the definition of religion the usual somewhat formal concept."

While the foregoing is the only official document which reflects the conflict among Selective Service officials in the construction of the phrase "religious training and belief", an examination of decisions by draft boards and by hearing officers of the Department of Justice will show that the phrase "religious training and belief" has been construed in a variety of ways, and there has never been any uniformity on the subject except to the extent that the decisions of the Circuit Court of Appeals for the Second Circuit have been followed by some officials.

The first Director of Selective Service, Clarence B. Dykstra issued a memorandum in December 1940 giving this interpretation:

"Religious training or discipline may be considered as having been received in the home, in the church, in other organizations whose influence is religious though not professedly such, in the school, or in the individual's own personal religious experience and conduct of life. Any and all influences which have contributed to the consistent endeavor to live the good life may be classed as 'religious training.' Belief signifies sincere conviction. Religious belief signifies sincere conviction as to the supreme worth of that to which one gives his supreme allegiance."*

The next Director of Selective Service, Major General Lewis B. Hershey issued an opinion contained in a memorandum to the Department of Justice dated March 5, 1942, in which he took a very different view from that of his predecessor. General Hershey ruled that a conscientious objector could not qualify for exemption unless he believed in "some source of all existence which is divine because it is the source of all things."*

* Quoted in "The Conscientious Objector" published by the National Service Board for Religious Objectors, Washington, D. C., June, 1944.

More recently General Hershey reiterated this view in his report "Selective Service in War Time" (United States Government Printing Office 1943, p. 258) in which he states that the construction of the law which has prevailed in deciding Presidential appeals, a responsibility entrusted to him, is that the statute requires belief in "a Deity or a power above and beyond the human."

Selective Service agencies have therefore been called upon to choose between conflicting precedents. On the one hand the only appellate court which previously passed upon the question repeatedly held that the "religious training and belief" required by the statute does not necessarily include belief in a deity, but may be based upon "response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse" (*United States v. Kauten, supra*). On the other hand, the Director of Selective Service in deciding Presidential appeals construes the statute as requiring belief in deity. It would be difficult for a draft board or hearing officer to decide which of these precedents is controlling. While the Federal courts are superior to administrative agencies, including all Selective Service agencies, it is seldom that a conscientious objector is able to obtain review in the courts and in practice General Hershey, who decides Presidential appeals within the Selective Service system* is usually the court of last resort.

The picture is further complicated by the fact that another department of the Federal Government has adopted a different construction from that of the Director of Selective Service. The Department of Justice issued a

* Executive Order 8619, 5 Fed. Reg. 5256.

memorandum to wardens of Federal prisons dated April 15, 1944, instructing draft boards connected with the prisons in reclassifying conscientious objectors to follow the rule of the *Kauten* and *Phillips* decisions.

A conflict therefore exists among the agencies which jointly deal with classification of conscientious objectors, since under the Selective Service Regulations appeals in cases involving conscientious objection are the subject of investigation and hearing by the Department of Justice, but may be finally determined by the Director of Selective Service on Presidential appeal (See Selective Service regulations, Secs. 627.5, 628.1-628.7, Executive Order 8619, 5 Fed. Reg. 5256).

Now that the Circuit Court of Appeals in the Ninth Circuit has adopted a different rule from that of the Second Circuit, bewildered draft boards are called upon to choose between conflicting rulings both in the judicial and administrative branches of the government. Four independent and authoritative bodies have expressed views on opposite sides of this question: The Circuit Court of Appeals for the Ninth Circuit, the Circuit Court of Appeals for the Second Circuit, the Director of Selective Service and the Department of Justice. The contenders are now deadlocked in a 2-2 tie which can be broken only by this court allowing the writ as prayed for.

III

The court below has erroneously construed the exemption for conscientious objectors in the Selective Training and Service Act.

The decision of the court below turns upon the construction of statutory language which is uncertain and am-

biguous. Due to the complexity of human motives, no precise definition of conscientious objection could have been written into the statute. But Congress was apparently not content to employ the word "conscientious" standing alone as a sufficient designation of those persons who should be exempted from military service because of their scruples against war and added the limitation that such scruples must be held "by reason of religious training and belief." 50 U. S. C. App. §305 (g).

The decision below has attached a narrow and special meaning to the word "religious" as excluding all those who do not acknowledge the existence of a deity. It holds that no person who does not profess belief in a god is capable of religious impulse or motivation. Under this reasoning great sections of humanity would be classified as irreligious, including humanists, Buddhists, Hindus, members of Ethical Culture Societies and others attached to no formal religious organization. Such reasoning disregards the fact that every human being is capable of religious experience regardless of what he may believe about the nature and creation of the universe.

As was pointed out by Judge Augustus N. Hand in *U. S. v. Kauten*, 103 Fed. 2d 703, 708, Congress has taken into account that in the present skeptical generation the compelling voice of conscience, whether or not it be identified with the word "God", is generally regarded as a religious impulse. The construction of the court below is unrealistic in ignoring this fact and imputing to Congress a discrimination in matters of religion which was never intended and should not be inferred in the absence of specific evidence thereof.

Not only is the lower court's construction of the statute unrealistic and discriminatory but also it fails to provide

a reasonable test of conscientious objection. In writing this statute Congress was not attempting to extend privileges to certain religious groups and withhold these privileges from others, but it was seeking a definition of conscientious objection to war for which an exemption could properly be allowed. In searching for the Congressional intent behind the words "religious training and belief", we must therefore determine what reasonable relation those words may have to conscientious objection. No such reasonable relation can be found between conscientious objection to war and belief or disbelief in a deity. The latter is not a reasonable test by which the existence of the former can be determined. It rarely happens that a conscientious objector can identify his scruples against war with the will of God. There are, of course, some conscientious objectors whose religion is authoritarian in nature, and who would say that their opposition to war is derived from the commands of God or of the church as God's voice, but it cannot be supposed that most conscientious objectors could identify their beliefs with their theology in such a simple fashion. To test a man's conscience by his theological beliefs seems to us entirely unreasonable, and we cannot believe that Congress ever intended to lay down such a test.

On the contrary, as cogently reasoned by Judge Hand in the *Kauten* opinion, it seems obvious that Congress was attempting to distinguish between those objectors to war who, responding to the promptings of conscience, take their stand upon principle and those who are acting merely on the basis of personal expedience or political belief. In using the words "religious" and "conscientious" in the statute, it seems plain that Congress intended to draw a dividing line between those who act

on the compulsion of inward scruples and those who object to war merely on political opinion or out of personal selfishness or cowardice. Such a construction of the statute appears entirely reasonable while the construction adopted below has not even the semblance of reality.

IV

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,

Amicus Curiae,

JULIEN CORNELL,

Counsel.

ERNEST ANGELL,

OSMOND K. FRAENKEL,

*Of the New York Bar,
of Counsel.*

FILE COPY

Office - Supreme Court, U. S.

FILED

JAN 13 1947

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

No. 538.

HERMAN BERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

PETITION FOR REHEARING ON CERTIORARI

A. L. WIRIN,
257 South Spring Street, Los Angeles 12,
Counsel for Petitioner.

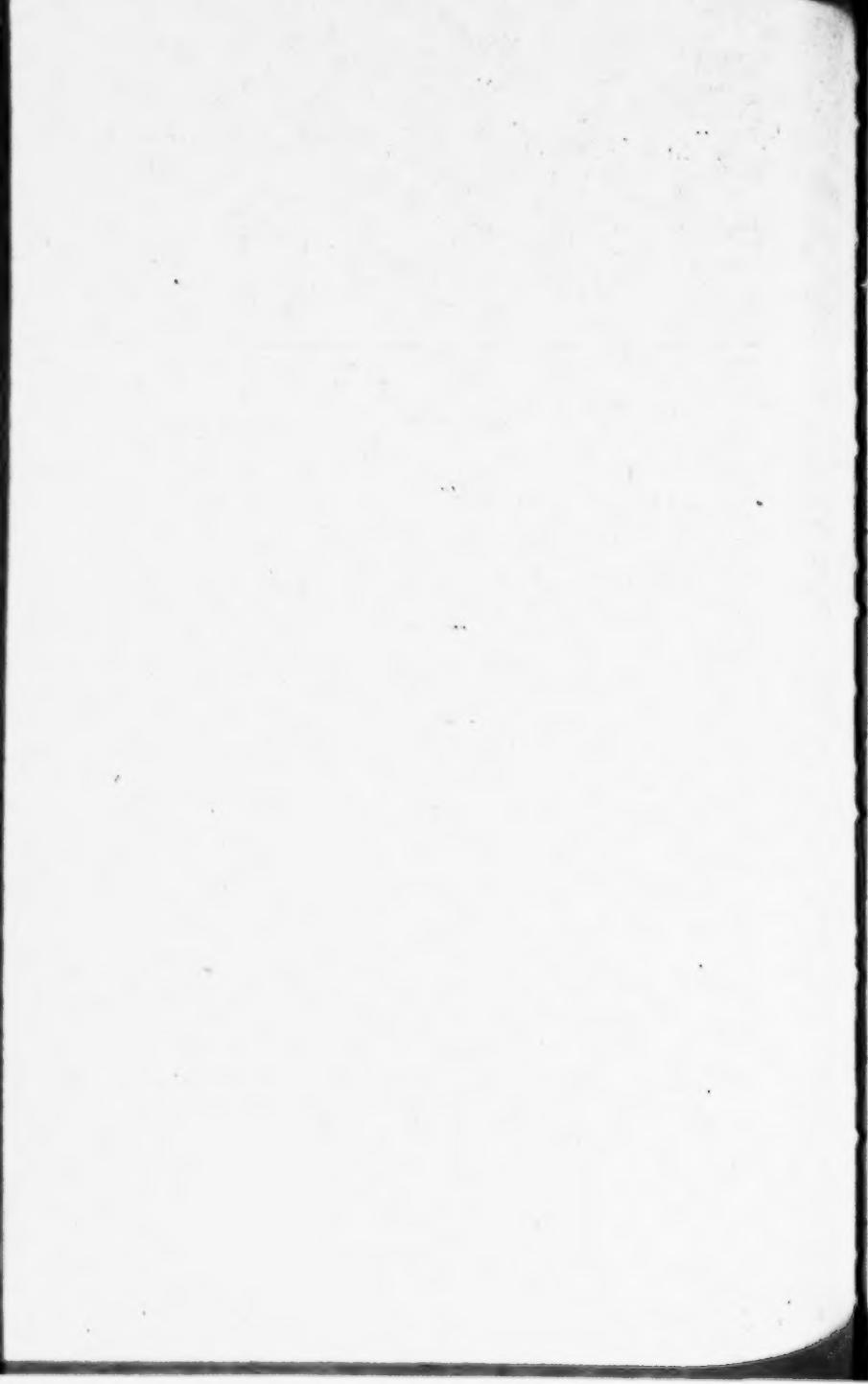
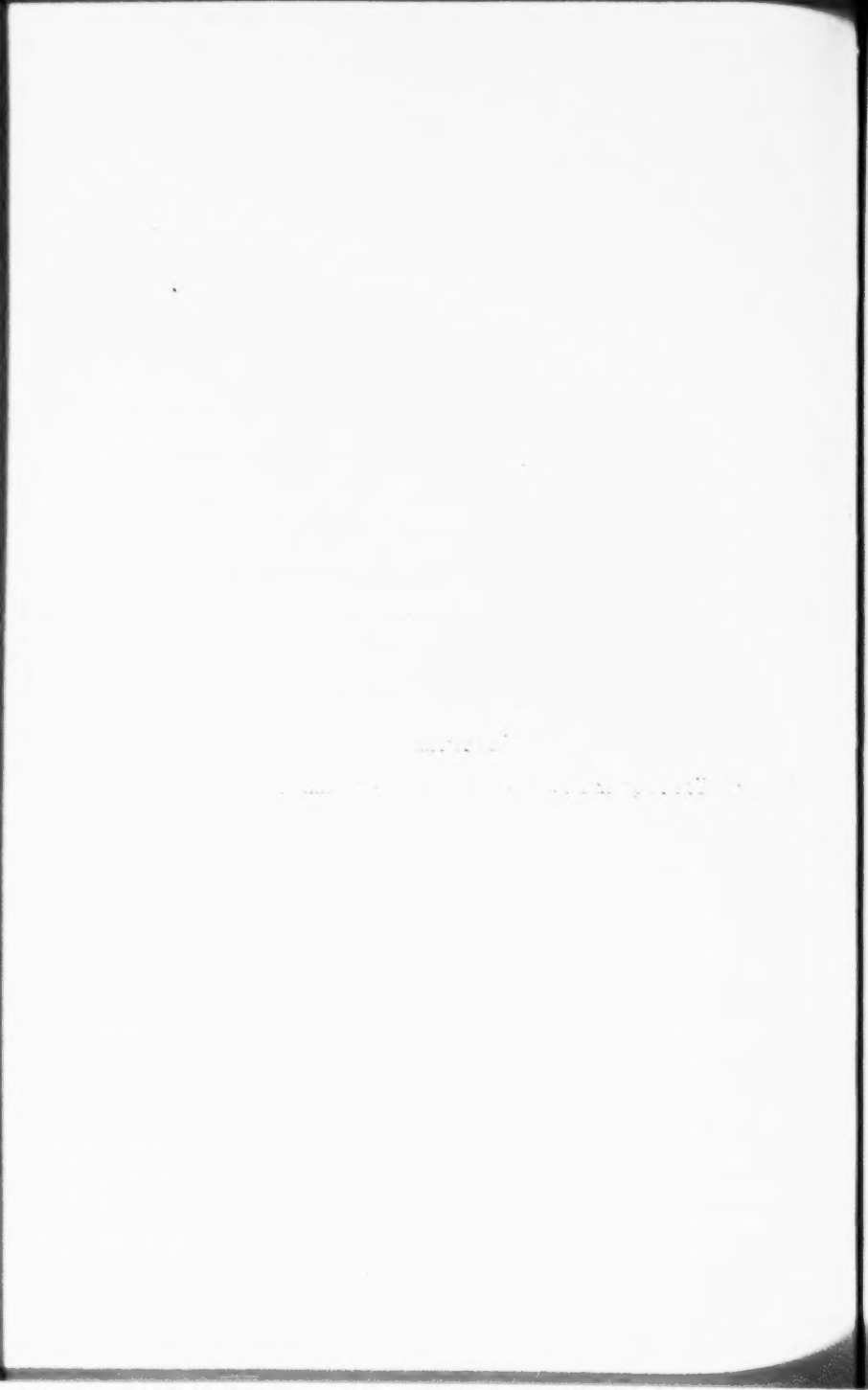


TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|--|------|
| Gibson v. United States, Oct. term, 1946, No. 23 (decided Dec. 23, 1946) | 4 |
| United States v. Badt, 141 F. (2d) 845..... | 2 |
| United States v. Badt, 152 F. (2d) 627 ; cert. dismiss., 66 S. Ct. 979, 90 L. Ed. 912..... | 2 |
| United States v. Downer, 135 F. (2d) 521..... | 1, 2 |
| United States v. Kauten, 133 F. (2d) 703..... | 2, 4 |

STATUTES

| | |
|--|------|
| Selective Training and Service Act, Sec. 5(g)..... | 1, 4 |
|--|------|



IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.
No. 538.

HERMAN BERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

PETITION FOR REHEARING ON CERTIORARI

This Court denied certiorari on December 23, 1946. A rehearing should be granted and the writ of certiorari issued, for the following reasons:

1. The decision of the Circuit Court below [R. 36], as to what constitutes "religious training and belief" within Section 5(g) of the Selective Training and Service Act, is in direct conflict with decisions of the Second Circuit Court of Appeals. The Court below expressly acknowledged that conflict, and frankly stated that it took "divergent views from those expressed in these cases" [R. 39]. Judge Denman stated that the decision of the majority "on this important question of law is in conflict with the decision of the Second Circuit in *United States v. Downer*, 135 F. (2d) 521 (C. C. A. 2, 1943). I am

in accord with all that the Second Circuit there says and holds" [R. 56].¹

The Court below was of the view that "philosophy and morals and social policy without the concept of deity cannot be said to be religion." [R. 46.]

The Second Circuit Court of Appeals took the view that a deep and compelling "inner mentor" is the equivalent of a "religious impulse", and constitutes "religious training and belief," (*Kauten v. United States*, 133 F. (2d) 703, 708 (C. C. A. 2, 1943). No belief in a deity is required, in the definition by the Second Circuit Court of Appeals below.

2. The decision of the Circuit Court of Appeals below, is in direct conflict with the definition of "religious training and belief" heretofore given by the Selective Service System itself.

The Selective Service System, in effect, has ruled that the belief in, and the practice of, certain fundamental religious doctrines, as for example, "the Christian Doctrines of Reverence for Life", constitutes religion.²

¹The decisions of the Second Circuit Court referred to are:
United States v. Kauten, 133 F. (2d) 703 (C. C. A. 2, 1943);
United States v. Downer, 135 F. (2d) 521 (1943);
United States v. Badt, 141 F. (2d) 845 (C. C. A. 2, 1944).

Cf. also:

United States v. Badt, 152 F. (2d) 627 (C. C. A. 2, 1945), certiorari dismissed on motion of Solicitor General, 66 S. Ct. 979, 90 L. Ed. 912).

²See discussion in Petition for Writ of Certiorari in the instant case, p. 12; also in Brief of American Civil Liberties Union, filed herein, *Amicus Curiae*, p. 8.

Belief in a deity is not an indispensable element in the definition of the Selective Service System.

3. The Selective Service System erroneously rejected the petitioner's application for a classification as a conscientious objector, its rejection being solely because of the petitioner's lack of belief in a supernatural God.

Thus the first hearing officer, C. H. Hartke [Supp. Rec. 16-29], recommended the rejection of the petitioner's claim, because of a lack of showing that the petitioner in his activities had made an effort "to carry out the wishes of a divine providence." [Supp. Rec. 28.]

And the second hearing officer, J. R. Files [Supp. Rec. 29-34], seems to have taken essentially the same view when he concluded that "None of the deep-seated beliefs of Registrant, as they were related at the hearing had any relation to worship, none comport with the generally accepted meaning of religious belief." [Supp. Rec. 32.]³

4. The evidence before the Selective Service System discloses affirmatively that the petitioner was a religious objector to war, within the definition of the phrase, "religious training and belief", by the Second Circuit Court of Appeals and by the Selective Service System itself.⁴

³For further analysis of the evidence before the Selective Service agencies, see Reply Brief herein, pp. 4-8.

⁴See Petitioner's Reply Brief herein, p. 4, for a further discussion of this point.

The petitioner showed, both in belief and in act, a deep and compelling "inner mentor", which is the equivalent of a "religious impulse", and constitutes "religious training and belief" (*Kauten v. United States*, 133 F. (2d) 703, 708 (C. C. A. 2, 1943).)

He practiced the "The Christian Doctrines of Reverence for Life" within the definition of the Selective Service System.⁵

Conclusion.

In *Gibson v. United States*, October term, 1946, No. 23 (decided December 23, 1946), this Court took a further forward step in according adequate judicial review to the religious objector to war, aggrieved in the administration of the Selective Service System; by granting a rehearing in the instant case, this Court will take its first step toward a judicial liberalization of the concept of religion, in general, and the meaning of the phrase, "religious training and belief" in the Selective Training and Service Act, in particular.

A. L. WIRIN,

Counsel for Petitioner.

⁵See Petition for Writ of Certiorari herein, p. 12, for text of Selective Service memorandum, defining "religious training and belief".

Certificate.

I certify that the within Petition for Rehearing is presented in good faith and not for delay.

A. L. WIRIN,

Counsel for Petitioner.